CIVIL AVIATION PROTOCOLS

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

PROTOCOL RELATING TO AN AMENDMENT TO THE INTERNATIONAL CIVIL AVIATION CONVENTION (97-4);

TWO RELATED PROTOCOLS TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION; AND

TWO RELATED PROTOCOLS TO THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR, AS AMENDED (EX. B, 95-1)

SEPTEMBER 29, 1981

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CIVIL AVIATION PROTOCOLS

TUESDAY, SEPTEMBER 29, 1981

United States Senate,
Committee on Foreign Relations,
Washington, D.C.

The committee met, pursuant to notice, at 9:40 a.m., in room 4221, Dirksen Senate Office Building (Hon. Nancy L. Kassebaum) presiding.

Present: Senators Kassebaum and Helms.

Senator Kassebaum. I would ask the first panel to please come to the witness table. We will begin our hearing on the five aviation protocols.

Before I read an opening statement, I would like to have a special introduction. I feel like a pupil welcoming a teacher. It is a great pleasure to have Senator Clifford Case of New Jersey with us this morning. He will introduce Mr. Romans, who is one of the members of the first panel.

I have been a great admirer for many years of the work Senator Case has done in the Foreign Relations Committee and in the U.S. Senate. It is a real pleasure to have you with us this morning, Senator Case.

STATEMENT OF HON. CLIFFORD P. CASE, A FORMER U.S. SENATOR FROM NEW JERSEY

Senator Case. Madam Chairman, this is an indulgence for me. I wanted to come. I wanted to come for several reasons. One reason was I wanted to sit under you. Another, of course, was because of my long association with the committee.

It is a great pleasure for me to be here. My purpose is to present a young man from our firm who is going to testify. He is a journeyman lawyer, experienced in this field. His name is John Romans. I think you will find him to be an expert in the particular area on which he will talk. So I do present him and I thank you so much for letting us come.

Senator Kassebaum. Thank you, Senator Case. I am sure, as you are aware, these protocols have been under discussion for a number of years.

Senator Case. Yes. I was on one of the panels when they were discussed several years ago.

Senator Kassebaum. I think it is important that we get this discussion underway and that we resolve in some way the question of these protocols. As a member of this committee, as well as chairman of the Aviation Subcommittee of the Commerce Committee, I am conducting the hearing on behalf of the full committee at the request of Senator Percy, to determine whether action by the committee is called for in the near future.

Three of the protocols before us are supported by the administration and are completely noncontroversial, as I understand it. These are treaty documents 96-4 and executive N and executive O, 96-1, which amend the Convention on International Civil Aviation.

Two protocols, however, the so-called Montreal protocols 3 and 4, have remained in this committee since 1977. It is these agreements on which the hearing this morning will focus.

I regret to say that the administration is not in a position to appear at this time on the Montreal protocols. A number of questions have been raised about these agreements and undoubtedly will be raised again this morning, which call for a response from the administration.

I have received a letter of assurance from Richard Fairbanks, who is Assistant Secretary of State for Congressional Relations, that the administration soon will arrive at a position on these agreements and inform the committee in writing. I will make his letter a matter of record.

[The letter referred to follows:]

DEPARTMENT OF STATE,
Washington, D.C.

Hon. NANCY L. KASSEBAUM,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KASSEBAUM: The interested agencies are giving close consideration to the issues posed by the Montreal protocols in light of your invitation to testify at the Committee's scheduled hearings, September 29.

I regret that we have not yet had time to arrive at a coordinated Administration position in order to testify at the hearings on September 29. We will be working to formulate such a position in order to provide it to you at the earliest possible time.

Sincerely,

RICHARD FAIRBANKS,
Assistant Secretary for Congressional Relations.

Senator KASSEBAUM. We therefore will hold the record open for the time being in order to receive the position of the administration, as well as to have their responses to any particular questions raised in the course of today's hearing.

I should say, however, that the committee would like to be in a position to consider the protocols at its next business meeting on October 20. I would expect that we would have the administration's views well in hand at that time. I understand that the Civil Aeronautics Board also will submit a written statement to the committee at the same time.

[The position of the Reagan administration was subsequently provided to the committee, as was a statement from the Civil Aeronautics Board, as follows:]

DEPARTMENT OF STATE,
Washington, D.C., October 22, 1981.

Hon. NANCY L. KASSEBAUM,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KASSEBAUM: I am writing to indicate the Administration's views on the following five treaties pending before the Senate Foreign Relations Committee concerning international civil aviation: Protocol Relating to an Amendment to the Convention on International Civil Aviation, submitted on January 19, 1981, (Treaty Doc. 97-4); Protocol Relating to an Amendment to the Convention on International Civil Aviation, submitted on March 22, 1979, (Ex. N 96-1); Protocol on the Authentic Quadrilingual Text of the Convention on International Civil Aviation, submitted on March 22, 1979, (Ex. O 96-1); and two Protocols to the Convention for Unification of Certain Rules Relating to the International Transportation by Air, submitted on January 14, 1977 (Ex. B 95-1). The first three treaties are technical amendments and a related Protocol to the so-called "Chicago Convention," and the fourth and fifth, Montreal Protocols 3 and 4, are two related Protocols done at Montreal in 1975 to amend the Warsaw Convention.

The first two of the technical treaties, an amendment to the Chicago Convention and related Protocol on the Authentic Quadrilingual Text of that Convention. The Protocol on the Quadrilingual Text annexes a Russian language text which has been thoroughly conformed with the present authentic English, French, and Spanish texts. The purpose of establishing an authoritative Russian text is to assist the U.S.S.R. in application of the Convention and participation in the International Civil Aviation Organization (ICAO).

The amendment to the Chicago Convention, which adds Russian to the list of authentic languages of the Convention, requires ratification by ninety-four contracting States. The Protocol—which actually contains the agreed Russian text—comes into force after the amendment comes into force and after the Protocol has been accepted by twelve States. Accordingly, we support U.S. ratification of these two treaties.

The third treaty, which also amends the Chicago Convention, permits a State in which an aircraft is registered to transfer certain of its functions and duties under the Convention to the State of an operator leasing, chartering, or interchanging that aircraft, subject to the operating State's agreement.

When the Chicago Convention was negotiated in 1944, the governments participating did not envisage the present extensive leasing of aircraft registered in one State are leased to operators in another State, the State of registry sometimes experiences considerable difficulty in discharging its responsibilities under Articles 12 (Rules of the Air), 30 (Aircraft Radio Equipment), 31 (Certificates of Airworthiness), and 32(a) (Licenses of Personnel). Ineffective discharge of these responsibilities by States of registry may impair the level of flight safety. Consequently, at the instance of the Federal Aviation Administration, the U.S. Delegation first raised this matter in the ICAO Assembly in 1971. After consideration by various ICAO bodies, the ICAO Legal Committee drew up an amendment to the Convention entitled Article 83 *bis*, which was approved by the ICAO Assembly in 1980.

Article 83 *bis* establishes a system whereby States may enter into bilateral arrangements delegating responsibilities under Articles 12, 30, 31, and 32(a) of the Convention. The amendment is cast in discretionary terms and a State of registry may agree to delegate any or all of its obligations under the specified articles. Thus a State remains free to agree to delegate its responsibilities only to the extent permitted by its domestic law.

This amendment of the Convention should substantially benefit the United States. As the supplier of a large percentage of the world's civil passenger and cargo aircraft, the United States is the largest lessor of aircraft to operators belonging to other States. This will likely continue in the future. Thus, the amendment would permit the U.S. to develop bilateral agreements with countries of foreign operators in order to properly adjust international responsibilities for the safety of aircraft. Ratification by ninety-eight Contracting States is required to bring the amendment into force. As the originator of the amendment, it would be disirable if the United States could be one of the first States to ratify it.

Montreal Protocols 3 and 4 are two related Protocols done at Montreal in 1975 to amend the Warsaw Convention. The Protocols were transmitted to the Senate for its advice and consent to ratification at the end of President Ford's Administration in January 1977. We have examined the Protocols carefully. We think that, together with appropriate supplemental measures for domestic compensation, the Protocols would provide an efficient and effective worldwide system of liability and compensation for persons and property in international flight. They also offer significant potential for savings through simplification of documentation and recordkeeping requirements in international air transportation.

International aviation is inherently a multinational business. Thus, there is a need for clear, consistent, internationally accepted legal rules defining the rights and liabilities of international carriers, passengers, and shippers. Such rules have generally been established by treaty, starting with the Warsaw Convention in 1929, which is still in force with respect to the United States.

The 1929 Warsaw Convention established that carriers would normally be liable for death and injuries unless they proved they were not at fault. It limited liability to about $8,300 except in cases of wilful misconduct or failure to give adequate notice of the limit of liability. Over ensuing years, the United States has steadfastly sought to modernize and improve the Warsaw system through higher limits of liability, improved systems of accident compensation, and modernization and simplification of document requirements. The Montreal Protocols are the culmination of these efforts.

Today, without the Protocols, liability for international aviation involving the United States if governed by the Warsaw Convention and by the "Montreal Agreement," a private carrier arrangement approved by the CAB in 1966. In the Montreal Agreement, the carriers agreed to increase their liability to $75,000, to waive certain Warsaw defenses, and not to challenge claims on the basis that they had "undertaken all reasonable action to avoid the accident." The Montreal Agreement does not change the "wilful misconduct" limit-breaker of the Warsaw Convention. Thus, plaintiffs can today still break the $75,000 limit by proof of wilful carrier misconduct.

The Protocols would establish a new system for passenger compensation. First, the absolute liability of the carriers would increase to 100,000 SDR's per passenger for death or personal injury, approximately $117,000; and 1,000 SDR's per passenger for baggage losses, about $1,170. The Protocols would eliminate the "wilful misconduct" limit-breaker, and provide that the $117,000 liability limit set by the Convention would be unbreakable. The Protocols also contain a "settlement inducement clause" which permits a court to impose attorneys' fees if a carrier did not offer to settle within six months of a claim at an amount at least equal to the ultimate recovery. Finally, the Protocols would expressly permit States to adopt domestic supplemental compensation plans, as long as these plans do not impose additional liability on carriers.

Thus, the liability system constructed by the Protocols involves three tiers of recovery. The first tier provides the worldwide liability of airlines in international flights—regardless of claimant, the nationality of the airline, or the place or cause of the accident—up to $117,000. The second tier involves the supplemental level of recovery adopted by individual States above the carriers' liability limit. Under the U.S. supplemental compensation plan approved by the CAB in 1977, the upper limit on this tier would be $200,000 plus unlimited medical costs. The third tier of protection would be provided by the individual. Passengers requiring compensation above that ensured by the first two tiers are free to purchase private insurance, without imposing the added cost for their additional protection on others who use the air transportation system.

We firmly believe that an adequate domestic supplemental compensation plan is essential to a satisfactory system of liability coverage to protect U.S. nationals. The limits of carrier liability under the Protocols are well below what may be necessary for U.S. claimants in many severe injury or death cases. This fact led the carriers and the Prudential Insurance Company of America to enter into the supplemental compensation plan approved by the CAB in 1977 and developed on the basis of criteria proposed by the U.S. Government.

The 1977 supplemental compensation plan is not flight insurance; damages must be proved. For proven damages, the plan provides up to an additional $200,000 coverage for U.S. residents, bringing their total protection for proven damages to $317,000. The supplemental plan covers U.S. residents even when flying between foreign points and provides for unlimited medical coverage.

Under the Protocols, a supplemental compensation plan cannot impose any additional liability on carriers and therefore must be financed by assessments on passengers. Under the 1977 plan, every person purchasing an international ticket in the United States would pay $2 into the compensation fund to be administered by the Prudential Insurance Company of America. The plan provides that it is subject to annual review by the CAB or its successor, the Department of Transportation. The amount of the charge and of passenger coverage may be periodically adjusted.

The Protocols have been pending for several years, and it may require several additional years for them to enter into force even after Senate advice and consent to U.S. ratification. Accordingly, prior to final entry into force of the Protocols for the United States, it will be in order to review the supplemental compensation plan to ensure that it is sufficient and appropriate to protect the interests of American claimants. Issues for possible consideration in this review of the supplemental compensation plan include the prevailing levels of tort recoveries in air accidents; the cost and availability of carrier insurance; and means to ensure the maximum possible extent of competition in constituting and administering the plan.

Accordingly, viewed in conjunction with an adequate and equitable supplemental compensation plan available to ensure protection of United States claimants, we believe the Protocols warrant ratification by the United States. The Protocols and such a supplemental compensation plan will provide a swift, sure system of liability protection for U.S. residents that is world-wide in scope. The Protocols will also permit considerable simplification in the recordkeeping and documentation requirements for international aviation. Finally, U.S. ratification would be received favorably by other foreign governments, many of which accepted significant changes in the Warsaw Convention system only under great pressure from the United States.

Sincerely,

RICHARD FAIRBANKS,
Assistant Secretary for Congressional Relations.

DEPARTMENT OF STATE,
Washington, D.C., November 9, 1981.

Hon. NANCY L. KASSEBAUM,
U.S. Senate,
Washington, D.C.

DEAR SENATOR KASSEBAUM: In response to your request, I transmit herewith our answers to certain questions regarding the Montreal Protocols raised by the Association of Trial Lawyers of America.

Question 1. At the June 26, 1977 hearings, DOS, DOT, and the CAB agreed that Montreal Protocols 3 and 4 were inextricably tied to a Supplemental Compensation Plan which was approved by the Civil Aeronautics Board and designed to enable victims of international aviation disasters to recover provable damages up to approximately $317,000.

I understand that the Supplemental Compensation Plan has been the subject of an appeal filed in the United States Court of Appeals for the District of Columbia in 1977 and that to date the Civil Aeronautics Board has routinely postponed filing its "record" in the matter on the ground that it is reconsidering the Supplemental Compensation Plan and exploring other alternatives to it. Is it not premature for the Committee to consider Montreal Protocols 3 and 4 when the Supplemental Compensation Plan which was to be an "integral" part of the package is in such an unsettled state?

Answer. We do not believe that it is premature for the Senate to consider the Protocols pending any further refinement of the supplemental compensation plan.

It will be in order to review the supplemental compensation plan prior to the entry into force of the Protocols for the United States in order to ensure that the plan is adequate and appropriate to protect the interests of American claimants. However, this determination will turn on the circumstances at the time the Protocols enter into force. Most major aviation countries are awaiting the Senate's decision on advice and consent to ratification before acting themselves on the Protocols. Thus, even after the Senate's decision, considerable time may elapse before the Protocols can be brought into force.

Accordingly, further detailed proceedings concerning the supplemental compensation plan as a precondition for Senate action could substantially delay the day when the Protocols can be brought into force because other nations await our lead. The results of the review could also be outdated and need further revision by the time the Protocols enter into force.

Question 2. Representatives of the American and London airlines' insurers have recently stated publicly that the cost of liability insurance coverage for airline passengers can and is being purchased for less than $1 per round trip per passenger and that "unlimited" liability insurance coverage would cost no more. They have also indicated that the insurance industry has full and adequate capacity to provide unlimited coverage for international air carriers. What economic justification is there for limiting recoveries by American international airline passengers for wrongful death and personal injury in this context and, indeed, what justification is there for the $2 ticket surcharge contemplated by the Supplemental Compensation Plan as proposed by the CAB?

Answer. We consider that the question of the costs and availability of carrier insurance is an appropriate subject to be addressed in a review of the supplemental compensation plan prior to the entry into force of the Protocols for the United States. There has been conflicting information concerning the cost and availability of such insurance, including the question of global limits on total risk. In the event that the review shows the charge or the level of coverage of the plan to be inappropriate, the plan can be modified accordingly.

Question 3. Attorneys for both the airlines and aviation accident victims claim that it is the limited liability system spawned by the Warsaw Convention which Montreal Protocols 3 and 4 amend which impedes the speedy settlement of claims since extraordinary measures must be taken to obtain full and fair compensation for aviation accident victims. In any event, the hearings of 1977 on the Protocols produced testimony that settlement of claims today frequently is accomplished within months of an aviation disaster. What real evidence is there that the Warsaw Convention system as modified by the Protocols would promote early settlement of cases?

Answer. One cannot guarantee that the Protocols and supplemental compensation plan will speed settlements in all cases. However, claimants will no longer be engaged in extensive litigation over the question of wilful carrier misconduct. All they must do is prove the actual extent of their damages. This can only help to make recovery swifter than in present circumstances where wilful carrier misconduct would be asserted by claimants and contested by carriers. Moreover, the Protocols include a "settlement inducement clause" permitting a court to impose attorneys' fees on a carrier, over and above the carrier's liability limit, if the carrier has not offered, within six months of the date the claim was filed, an amount at least equal to the ultimate recovery. This provides a clear incentive for speedy settlement.

Question 4. Inflation and the corresponding devaluation of the dollar and other national currencies since 1971 and particularly the substantial loss in the purchasing power of the dollar since 1976 suggest that even if the levels of compensation provided by the Montreal Protocol—SCP package were deemed adequate when formulated, should not the question of "adequacy" of coverage for the majority of American passengers be reviewed?

Answer. As we have indicated, the question of adequacy of coverage under the Protocols and the supplemental compensation plan will require continuing review. The Committee has received testimony indicating that the Protocols and supplemental compensation plan would have offered recoveries corresponding favorably to those received in crashes in recent years; there has also been conflicting testimony suggesting a need to review and possibly increase coverage under the supplemental compensation plan. This question is an appropriate subject to be addressed in a review of the plan prior to entry into force of the Protocols for the United States. However, as stated above, we believe that this review would appropriately take place following Senate action.

Question 5. Would the abolition of the limited liability system that presently prevails in international aviation have any meaningful effect or impact upon the well organized uniform rules adopted and promulgated by the International Civil Aviation Organization (ICAO)?

Answer. Ratification of the Protocols will not directly affect current ICAO standards and recommended practices. However, we believe that U.S. repudiation of the Montreal Protocols—which were largely the product of U.S. urging and leadership—would impair U.S. credibility, influence, and authority in future international aviation negotiations in ICAO and elsewhere.

Sincerely,

RICHARD FAIRBANKS,
Assistant Secretary for Congressional Relations.

CIVIL AERONAUTICS BOARD,
Washington, D.C., October 15, 1981.

Hon. CHARLES H. PERCY,
Chairman, Committee on Foreign Relations,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: We are here transmitting copies of a Statement of the Civil Aeronautics Board describing the current status of the proceeding pending before the Board on the Supplemental Compensation Plan. That Plan would provide recoveries for passengers in international air accidents in addition to the limited recoveries provided by Montreal Protocol No. 3, which is currently being considered by your Committee. We would appreciate the inclusion of our Statement in the record of the hearings on ratification of the Montreal Protocols which were held September 29, 1981.

Thank you for your consideration.

Sincerely,

ELIZABETH E. BAILEY,
Acting Chairman.

Enclosures.

PREPARED STATEMENT OF THE CIVIL AERONAUTICS BOARD

Madam Chairman and members of the Committee, Montreal Protocol No. 3 would establish an unbreakable passenger liability limit for international carriers at 100,000 Special Drawing Rights, or approximately $116,000 based on the International Monetary Fund's current valuation. The Protocol would close the loopholes in the Warsaw Convention that often allow recoveries far in excess of the current limit or the new $116,000, and would limit carrier liability regardless of the degree of fault to this inadequate level per passenger. Accordingly, in 1975, the Air Transport Association filed a Supplemental Compensation Plan with the Board, which would increase potential passenger recoveries under Montreal Protocol No. 3. We are pleased to have this opportunity to bring this Committee up to date on the present status of that proceeding.

The Supplemental Compensation Plan constitutes an agreement between most carriers serving the United States, and between those carriers and the Prudential Insurance Company of America, as contractor, to establish a fund for the purpose of supplementing the limits of international carrier liability to passengers for death and injuries which would be effective under the Warsaw Convention and the proposed Montreal Protocol No. 3. As an intercarrier agreement, the Plan has been filed with the Board for approval under section 412 of the Federal Aviation Act.

The Supplemental Compensation Plan, as proposed in 1975, would increase the possible recovery for claimants on behalf of passengers by $200,000 based on proven damages, making the total potential recovery $316,000, funded from a non-airline source. In addition, medical expenses would be covered by the Plan without any limitation on recovery. The Plan was to be funded by a mandatory surcharge, initially $2, on each international ticket sold for international air transportation originating in the United States, whether one way or round trip. United States domiciliaries or permanent residents would be covered by the Plan's protection whether or not they had paid a surcharge for the particular journey. In other words, U.S. residents would be covered even on a journey between two foreign points. Other passengers would be covered only if the surcharge was, or should have been, collected for the particular journey on which the accident occurred.

The Board approved the Supplemental Compensation Plan by Order 77-7-85, on July 20, 1977, just prior to the July 26, 1977 hearings of this Committee. In that Order the Board declined to pass upon the public interest of the Warsaw Convention, or Montreal Protocol No. 3. The latter specifically permits a State to adopt a Supplemental Compensation Plan, like that now pending before the Board, subject to certain prescribed conditions (Article 35A). The Board recognized that in no event would the Supplemental Compensation Plan become effective until the entry into force of Montreal Protocol No. 3. Therefore, the Board considered the question of the public interest of the Warsaw Convention and the Protocols as an issue which should be resolved by this Committee, and which was not properly an issue before it in the Supplemental Compensation Plan Proceeding.

On August 9, 1977, following the previous hearings before this Committee, the Aviation Consumer Action Project (ACAP) filed a Petition for Reconsideration of the Board's approval order. ACAP argued that the record was inadequate, that a hearing should be held, and that various questions, including the mandating of any passenger charge under the compensation plan, had not been adequately considered by the Board. Sometime later the Association of Trial Lawyers of America (ATLA) filed a Petition supporting the ACAP Petition and requesting reopening of the record and an evidentiary hearing. In addition, ATLA filed a Petition for Review of the Board's approval order in the United States Court of Appeals for the District of Columbia Circuit. The court proceedings have been stayed pending Board action on the reconsideration petitions. The Board has not acted on the reconsideration petitions since it did not appear that there was any immediate prospect for ratification of the Protocols by this Committee. Therefore, although the Supplemental Compensation proceeding remains pending before the Board, no action has been taken in four years.

In the time that has elapsed since the Board's 1977 approval order, there have been many changes in the industry and the economy which might have a direct bearing on the Plan and its operation. Enactment of the Airline Deregulation Act of 1978, Public Law 95-504, October 24, 1978, and the International Air Transportation Competition Act of 1979, Public Law 96-192, February 15, 1980, both of which were aimed at removing governmental intervention from aviation as much as possible, creates a totally different atmosphere than existed in 1977. On the specific features of the plan, the Board, for example, would be concerned that the level of recoveries under the Compensation Plan be sufficient to rectify the inadequate limits on recoveries under the Protocol. While we do not currently have information as to the effects on recoveries of the high inflation rates that have plagued the economy for several years, the value of a recovery under the Plan may be significantly less for claimants now than in 1977, and may not, therefore, be adequate. In addition, the period has been marked by very high interest rates, a factor which might affect both the surcharge-coverage levels of the Plan, and the value of a possibly more prompt recovery under the Plan. Another factor which could affect the costs of the Plan's coverage is the safety experience of the international air carriers, which has improved significantly. We understand the State Department believes that it would be desirable to review the Supplemental Compensation Plan to ensure that it adequately protects U.S. claimants.

In view of the pending proceeding before the Board, it would be improper for the Board to express any view, even tentative, on its ultimate conclusions in reconsideration of the Supplemental Plan. It does appear, however, that the Board's reconsideration of its 1977 order, in accordance with the pending petitions, would necessarily require a reopening of the record and supplementation and reexamination of the economic data relevant to the operation of the Plan.

If the Senate decides to give its advice and consent to ratification of the Protocols, either subject to implementation of the Supplemental Compensation Plan, or independently of the Plan, it is the Board's tentative view that that would be the proper time to reopen the record in the pending proceeding and reconsider the Supplemental Compensation Plan in light of current economic data and any other objections that may be raised. The Board would not consider that it was obligated to approve any particular Supplemental Compensation Plan, unless it found the Plan to be in the public interest under the Federal Aviation Act.

Again, we wish to express our appreciation for this opportunity to bring you up to date on the status of the Supplemental Compensation Plan proceeding.

Therefore, we will now proceed and hear the comments of the witnesses in this first panel. They are Mr. Gray, Mr. Romans, and Mr. Konigsberg.

Senator Case, any comments that you might wish to make from past experience with this will certainly be welcome for as long as you care to stay.

Senator **Case**. You are most generous. Thank you.

Senator **Kassebaum**. Mr. Romans, since you are in the middle and since Senator Case has introduced you, why do you not lead off?

STATEMENT OF JOHN N. ROMANS, AVIATION TRIAL LAWYER, NEW YORK, N.Y.

Mr. **Romans**. I am particularly pleased, Madam Chairman, to have this opportunity to testify in support of the ratification of the Montreal protocols. My perspective is a practical one, that of a trial lawyer working daily with the problems governed by the Warsaw Convention which will be modified by the protocols if ratified.

I have been trying aviation cases for over 10 years, aviation cases in the domestic area which involve the old fault system and aviation cases in the international area which involve the Warsaw Convention, what I call the modern no-fault system. This experience has led me to conclude that the no-fault system is far superior from the standpoint of the passenger.

Briefly stated, there are three reasons that I see that make this no-fault system better. First, it gets money into the hands of the passenger much more quickly. Second, it saves transaction expenses, which include legal fees and other expenses of litigation. Third, it provides compensation to passengers in those factual situations where no responsible party is at fault, such as an act of terrorism. In these factual situations, a passenger would not recover anything under our old fault system, but would receive compensation under the no-fault system of the Montreal protocols.

Let me expand a moment on those three points. Money is paid to the passengers much more quickly under a no-fault system. Certainly claimants should be properly compensated, but I believe that they should receive their compensation promptly. Under the fault system the issue of liability has to be determined before any passenger can receive compensation, and the issue of liability in airplane accidents takes a very long time to resolve. Historically, it takes from 2 to 6 years.

When a breadwinner is killed the family is not interested in poring through file cabinets full of documents and specifications. Nor does the family care very much about 4 to 6 months of oral depositions. I do not even think that the family wants to see an extremely skilled aviation trial lawyer during a 4- to 6-week trial demonstrate those skills during the determination of who is at fault.

It seems to me that a family has an economic need. That need should be fulfilled promptly, not after 2 to 6 years.

The second area on which I would like to expand is the substantial saving in costs, both to the plaintiffs and to society in general which will result. Probably the most important area of cost saving to the plaintiff is plaintiff's attorneys' fee. Traditionally in our old fault system, a plaintiff hires an attorney on a contingency fee basis. While the contingency fee varies from State to State, it is approximately one-third of the compensation received. Therefore, if $300,000 were received by a plaintiff, $100,000 would be paid to that plaintiff's lawyer.

The contingency fee may have a very good place in our jurisprudence. I think of it as a high-risk, high-reward system. A given plaintiff may bring a case, and even though the attorney works very hard on it, at the end there may be no recovery. When a recovery is accomplished in a different case, however, our system benefits that plaintiff's attorney with a very high rate to take into account those cases in which no recovery at all was received.

I would point out, however, that in the commercial aviation system, when a plane goes down today there is very little question but that someone was at fault. In an aviation disaster there is a recovery in almost every case. I would point out, therefore, that the contingency fee system as applied to aviation cases, which some people have estimated rewards a plaintiff's attorney at the rate of $10,000 per hour expended, is a little high.

Under the Montreal protocols there would be no necessity for a plaintiff to enter into a contingency fee agreement with an attorney. The plaintiff would be assured of a recovery. The attorney could charge his or her customary hourly rate, and perform the legal services necessary, which only go to the question of damages. The result would be fair compensation for the attorney and a substantial saving for his or her client.

The second area were I have seen a great deal of time and effort expended, where it might not otherwise be expended, involves what is known as the Plaintiffs' Discovery Committee. After an aviation disaster 100 to 300 cases may result. In order to manage these cases the court will appoint three or four attorneys representing plaintiffs and assign them the primary responsibility for conducting discovery on the issue of liability only.

The Plaintiffs' Discovery Committee is compensated by receiving a percentage of the recovery of every case. These fees accumulate into a fund which is quite substantial. It has been estimated to amount to over $1 million in one case I know of, and I suspect there are very substantial Plaintiffs' Discovery Committee fees in most aviation crash cases.

Now, in order to justify this very substantial fee, it has been my experience that the Plaintiffs' Discovery Committee bends over backward to be particularly thorough in its investigation. Often facts that have been fully set forth by the National Transportation Safety Board investigation are rehashed for days and weeks at a time. There is a tremendous amount of money spent, both by plaintiffs and defendants determining factual data which was determined previously.

Should the Montreal protocols be ratified, there would be no need for a Plaintiffs' Discovery Committee in any international case because liability would not be disputed.

The third advantage of the protocols is that passengers would receive recovery in areas where no responsible party is at fault. A case that I handled some years ago which illustrates this point is the hand-grenading of an airline's passengers in an airline terminal in Athens. Two terrorists lobbed three hand grenades into a line of passengers waiting to board an aircraft. Five people were killed and many more were injured.

In that case a number of lawsuits were brought. I do not think that there was any serious question that the airline was not at fault. If the old fault system had applied, the passengers would have had to travel to Athens and they would have had to sue the Athens airport authority, which was a division of the Greek Government. My own estimation is that their chances of success in that lawsuit would not have been very good. But under the absolute liability system of the Warsaw Convention they sued the airline, the airline was absolutely liable, and the passengers received compensation.

Another example is the hijacking of passengers to a desert location and the holding of those passengers by the terrorists as hostages for 3 weeks. Those passengers received compensation.

A third example, one of real concern to the industry, is the possibility that a terrorist group would get a heat-seeking missile and fire that missile at a wide-bodied aircraft. A few years ago that scenario was thought to be rather imaginative and not realistic. But only in the last month, I read in the newspaper about an ex-CIA agent who was recruited by an organization to get a heat-seeking missile. Luckily, he did not succeed in his efforts, but the possibility was there.

Under the old fault system, passengers killed in an incident such as this would receive no compensation. But under the Montreal protocols they could prove and receive damages for over $300,000.

Those who resist the ratification of the protocols are forced to admit their advantages, but make one major point. They say there is a limit of liability, and that the limit of around $325,000 is not enough.

I think that they are taking a revolutionary approach. They do not want the Montreal protocols adopted and they hope that the United States will denounce the Warsaw Convention, which as this committee knows is the most widely adhered to convention governing private international law. After the U.N. Charter, I think it is the most widely adhered to treaty in the world.

A similar revolutionary approach was taken back before this committee in 1955 when the Hague protocol to the Warsaw Convention was discussed. The Senate did not ratify the Hague protocol. The major effect of that decision was that for the next 10 years Americans were faced with a limit of liability which was one-half that of the limit that people in most other parts of the world received. So while the Hague protocol doubled the limit of liability throughout most of the world, Americans did not have the advantage of that increase.

I take a more evolutionary approach. I think that the Montreal protocols provide a number of significant advantages which I have just discussed. In addition, they include an over 400-percent increase in the limit of liability from the current $75,000.

Furthermore, they include a settlement inducement clause which vigorously stimulates the airline to pay the passenger in approximately 6 months. If the airline does not pay, then the airline may be liable to pay attorney's fees as well as the proven damages.

There is another consideration that I think the committee should take into account. In the real world we deal with limits all the time, and the limits of liability that we have to face in personal injury and death are the fact that we might be killed by a taxicab or we might be killed by a person driving with no insurance. In those situations the realistic limit is about $10,000.

Moreover, we might be killed by a member of the public who has a reasonable insurance policy. That policy might limit coverage to $50,000 per person or $100,000 per accident. If we were killed by a person with such a policy, the limit would be $50,000 per person. I do not think that any of the plaintiffs' trial lawyers would question that. In the normal course, upon receiving the policy limits, they would understand the situation, and $50,000 is all that you would recover. The limit of the Montreal Protocols is over $300,000.

There is another philosophical point which the Senate will have to determine. That is whether a very wealthy person should depend upon the other passengers on the airplane to insure a multimillion-dollar recovery or should that person, after some limit, be it $300,000 or whatever figure, be responsible for carrying his or her own insurance for the welfare of his or her family.

As I have said, I take the evolutionary approach. I do not think we are going to stop at $325,000. I think the limit will increase. There is machinery currently in the protocol to automatically increase the limit. Furthermore, the supplemental compensation fund, now paying $200,000 is likely to pay more money in the future.

The Montreal protocols, as the latest development in the system of resolving international aviation disasters, deserve ratification.

Thank you very much for the opportunity to make these comments.

[Mr. Romans' prepared statement follows:]

Prepared Statement of John N. Romans

Madam Chairman and Members of the Committee, my name is John N. Romans. I am pleased to have this opportunity to testify in support of the ratification of the

Montreal Protocols 3 and 4 to the Warsaw Convention. My perspective is a practical one: that of a trial lawyer working daily with problems governed by that treaty.

I have been actively engaged in domestic and international aviation accident litigation for over 10 years, and write and speak in the field. Representing airlines I have handled cases concerning varied, and some fortunately unique, situations including the handgrenading of an airline's passengers by terrorists in a foreign air terminal, and the hijacking of an airplane to a desert location, where the passengers and crew were held hostage. I have also handled cases resulting from a major domestic crash.

While domestic aviation cases often involve complicated conflicts of law issues and other legal uncertainties which increase the difficulty and the cost of their resolution, the Warsaw cases I have handled have been resolved in a "no-fault" environment. This experience has led me to conclude that from the passenger-airline prospective, the modern "no-fault" system is far superior to the older "fault" system.

The Montreal Protocols 3 and 4 are a recent example of the trend toward a no-fault system. Under no-fault the long and complicated procedures aimed at determining culpability are bypassed and a short and simplified procedure substituted in their place. Pursuant to the no-fault Montreal procedure adequate compensation is quickly placed in the hands of those who need it with a minimum of legal and other administrative expenses.

Under the fault system it has been my experience that large quantities of time are spent in amplifying, or often just restating, the post crash factual investigation which has already been performed by the National Transportation Safety Board. The next of kin of a person killed, or a seriously injured person herself, is not really interested in the taking of hundreds of depositions, the poring through cabinets full of documents, the inevitable legal skirmishing in court, or the technical expertise displayed during a four to six week trial. These events, devoted solely to the issue of liability routinely occur and must be decided before the damage issues are determined.

Disputes over fault will occur in any system, but under the Montreal Protocols injured passengers will receive compensation for their losses and will not have to await the outcome of these disputes. The fact that an airline, the United States Government (as employer of air traffic controllers or other involved personnel), the aircraft manufacturer, or some combination of these is liable in the event of a crash is usually not in doubt. However, uncertainties as to which defendant is liable, and what percentage of the loss a given defendant will bear, are often disputed, and take significant periods of time and energy to resolve. While important to the defendants, these issues have little bearing on a passenger's loss, except that in the fault system they have to be resolved before the passenger can receive compensation. In contrast, under the Montreal Protocols, where liability is absolute and only the amount of damages is at issue, the area of dispute is simplified and can more easily and efficiently be resolved.

An example of the kind of procedure which might be dispensed with is the Plantiff's Discovery Committee. The Committee often consists of three or four plantiff's attorneys designated by the court to handle pre-trial liability discovery of the 100 to 300 cases brought after a crash. The fees of these committees and the work generated to justify those fees are not insubstantial. In prior litigations the district courts have ordered the claimants and plantiffs to pay a precentage of every settlement or judgment to the Plaintiffs' Discovery Committee, a fund estimated in one litigation to total from two to four million dollars.

Under the Montreal Protocols, claimants will not have to wait for expert aviation counsel to have the time to try their cases. If a given case is not settled, it can be tried adequately by any trial lawyer competent in the personal injury area. No special expertise in aviation would be required.

Finally, under the Montreal Protocols no-fault system, recoveries will be received for death or personal injury in cases where, because the airline is not at fault, no recovery would otherwise be available. For example, when terrorists threw handgrenades into a group of passengers in a foreign terminal in 1973, killing five and injuring many more, it was clear to all that the airline was not at fault. Under the fault system a claimant would have had to travel to that foreign location and attempt to seek recovery from the government authority which operated the terminal, an effort not likely to succeed. Under the absolute liability provisions of the Warsaw Convention, however, those plaintiffs brought suit in the United States against the airline which was absolutely liable. The plaintiffs received compensation. Other examples of recoveries under the Protocols which would not likely occur under the fault system include injuries and deaths caused by hijacking and those caused by a terrorist group shooting down a wide-bodied aircraft with a heat-seeking missile.

While the many virtues of the Montreal Protocols cannot be disputed, some parties complain about the current limit of liability. They would suggest that the United States denounce the Warsaw Convention, the most widely adhered to treaty governing private international law. In 1955, a similar revolutionary view counseled against the ratification of the Hague Protocols, with the result that for the next ten years the recoveries of Americans were limited to fifty percent of the amount available to people in most of the other countries of the world.

I take a more evolutionary approach and believe that the limits will increase. The Protocols include machinery for automatically increasing the limit. In addition, the supplemental compensation plan should pay more compensation once a fund is built up.

The Montreal Protocols, as the latest development in the system of resolving international aviation disasters, deserve ratification. Thank you for the opportunity of making these comments.

Senator KASSEBAUM. Thank you, Mr. Romans.

Mr. Konigsberg, let us go to you, because I am sure you will have some points of disagreement with the previous speaker.

STATEMENT OF ALAN J. KONIGSBERG, ESQ., KREINDLER & KREINDLER, NEW YORK, N.Y.

Mr. KONIGSBERG. Yes. Thank you very much, Madam Chairman.

I appear as a member of the firm Kreindler & Kreindler. Unfortunately, my partner Lee Kreindler, who had anticipated being able to testify here today, could not do so because of the holiday.

I would like to make some remarks, though, which in sumary are that the committee in our view should reject the Montreal protocols or at the very least defer action on them. You commented on the lack of information and position by the administration. I think that is quite significant. These treaties have been knocking around now since 1977 in this committee, and I think it is quite significant that neither the State Department is prepared to take a position today on it, nor is the CAB, which has had the supplemental compensation plan under review and study for over 4 years, prepared to take a position on it.

In fact, we are advised they are reconsidering and reviewing their own suggestions and their own position on whether or not the supplemental compensation plan is worthy of support and enactment.

I think, to place the merits of the protocol apart from the issue of whether or not we should delay action on them into perspective, we have to consider that the protocols in effect are going to deny existing rights of passengers and take away from them the right to sue and ultimately receive provable compensation for their losses. That is what is being taken away, in a situation where the losses may be quite substantial.

We have heard arguments made on behalf of the airlines that these protocols that would do away with rights of the passengers are really for the passengers' benefit. With all due respect, as the only member of the panel here who represents passengers, I think as to what really is in the passengers' interest. From the point of view of those who represent the passengers, I can say unequivocally that the passage of these protocols certainly is not in the passengers' interest.

The comments to the effect that we would be limited to a $325,000 recovery, no matter how egregious the conduct of the airline, is simply not a benefit to the passengers. In fact, based upon our experience approximately half of the American passengers in airline litigation would be undercompensated if this treaty were to be passed in its present form.

The treaty as proposed is an unbreakable limitation, irrespective of how egregious the conduct of the airline is. More than that, the passenger is being asked to fund his own limitation of liability. He is being asked under the proposed treaty to pay $2 for the privilege of having his provable damages—and I stress that. This is not a life insurance program where someone buys life insurance programs and a day or a week after the decedent passes away a check in the mail is received. What we are talking about is damages that have to be proven and established before an independent tribunal and a jury.

The passenger under the protocol is being asked to pay the cost of this insurance plan, of the additional $200,000. Not only is he being asked to pay for it, he is being asked to pay for it at over double the market rate of the presently available insurance, available to domestic airlines, which are not limited.

I have not heard any testimony or read any documents thus far which challenge the contention that we have made, and which is supported in our written presentation which I propose to hand up at the conclusion of the hearing, by my partner Lee Kreindler, that there is presently available on the international aviation insurance market unlimited insurance coverage with unlimited liability limits, at less than half what is proposed in the supplementary compensation plan. I have not heard any dispute from either the Prudential or the CAB that those facts are true.

As Mr. Brennan from USAIG, who testified and spoke recently at public meetings attended by other underwriters, all agree that the international airlines have available, if they choose to have it, unlimited liability insurance for very low cost. I am unaware of any international airline that is uninsured. If they are uninsured, I would suggest that it is at their option; because it is a decision that they have made. But I am not aware of any international airline now that does not carry insurance.

In summary, as to the passengers I would suggest that there is no benefit. As to the airline, I am puzzled as to what benefit they would achieve by the passage of this treaty, because of the availability of cheap, unlimited aviation insurance. I just do not understand why they want it.

The benefit to the legal system that has been proposed as underlying the justification for these treaties, similarly I do not see. I do not think there is any evidence to suggest that the system would be streamlined or improved, or that litigation somehow would be reduced if these treaties were passed. It is still necessary for the passenger to prove his damages. I do not think there is any doubt about that. And to prove them he is going to have to hire a lawyer.

Our experience has shown that the passenger who attempts to negotiate with the airline without benefit of a lawyer is severely disadvantaged. I am not aware of any situation where a passenger negotiating on his own without an attorney is as well treated and comes off as well as one who has as lawyer.

While I am on the subject of the possible benefit to the legal system, let me discuss frankly the notion of attorney's fees, because I anticipate that the Chair and committee might be interested in this or might consider my remarks suspect because, as representatives of the passengers, we receive attorney's fees for the work that we do.

First, in recognition of the likelihood of success in establishing liability against an airline, speaking on behalf of our firm's fees and I think generally on behalf of the attorneys who represent passengers and who do a lot of passenger representation in international aviation accidents, the fees are substantially lower than the one-third contingency fee to which Mr. Romans referred.

In a mass air disaster situation, it is not unusual for the fees to be 25 percent or less. In one recent mass disaster litigation, our fees were slightly in excess of 12 percent, which is what we charge.

So I think that the attorney's fees, as a result of the recognition on the part of attorneys that the legal problems involved in proving liability in an airline accident are less, have also been reduced because of that.

Mr. Romans referred to some of the benefits of the legal system under no fault as simplifying the procedures involved in getting the client's or the passenger's money. That certainly is commendable. But I happen to represent passengers who were involved in the very cases that Mr. Romans was discussing, the cases in which terrorists attacked passengers in the Athens Airport and cases in which terrorists held hostage passengers in the Middle East.

In all of those cases, when claims were made on behalf of the passengers under the absolute liability provisions of the existing treaties, the Warsaw Convention and the Montreal agreement, it was the airlines who denied liability under them. Those claims were not promptly paid at all. Those claims were fought, they were litigated.

When the trial court decided against the airline, they were appealed. They were appealed in the *Athens* case to the second circuit court of appeals and to the third circuit court of appeals. The airline sought certiorari when both courts ruled in favor of the passengers.

Those cases were not cases in which the airlines willingly accepted the absolute liability portions of the Warsaw Convention and the Montreal agreement. I question whether or not really they would act any differently when confronted with having to pay claims were these protocols to be passed.

So in looking at the possible benefit to the passengers, the airline and the legal system, I do not see any benefit. Under the present system of litigation, the most recent aviation disaster in the United States, the DC-10 crash in Chicago, has had no liability discovery taken on it because the airlines admitted liability for negligence. And there was very little work done.

Regarding the discovery committees which have been formed in airline accident cases in which liability was contested by the airline, I should point out that when those fees were paid they were not paid by the airline, but were paid by the other attorneys for the other passengers, out of their fees, not out of their passenger or clients' recoveries, but out of the attorney's fees for the other passengers. So there was no additional cost whatsoever, either to the airline or to the other passengers.

The other benefit which has been asserted to be achieved were these treaties to be passed is a national benefit or an international diplomatic benefit. I have not heard anything today, because the State Department does not appear here today, but I have not read anything either, to explain to me exactly what this international diplomatic benefit is to be were these protocols to be passed.

How is it in the American national interest to have these protocols passed which would have the effect of severely limiting provable damages, particularly on behalf of American passengers? I think it is important to note that this limitation would not only work an injustice on American passengers, but would work an injustice on passengers who have even modest or substantial earnings from other countries, whether they be an oil sheik from the Middle East or a West German businessman.

The fact of the matter is, given inflation, which has occurred with extraordinary proportions during the last 4 years, people are earning more money and the recoveries that are involved in wrongful death and personal injury litigation substantially have increased.

So I think when we look at the protocols in view of the possible benefit to the passengers, the airlines, the legal system or the Nation, we find that there really is no substantial benefit on any of these accounts. For those reasons, we would suggest and recommend that this committee reject these protocols and not submit them to the Senate for consideration.

Thank you.

[Mr. Konigsberg's prepared statement follows:]

PREPARED STATEMENT OF ALAN J. KONIGSBERG, ON BEHALF OF LEE S. KREINDLER

Madam Chairman and members of the Committee on Foreign Relations, I submit this statement to you today individually and as a representative of those lawyers in my law firm who have expertise in representing individuals and families who have sustained damage or incurred a substantial financial loss as the result of an aircrash or other tragedy. By reason of our experience we have come to understand the value of life as it is necessarily measured in the courtrooms of our country and in other countries. We have had to deal with the complex and challenging legal issues which abound in the area of international aviation accident law in order to obtain fair compensation for Americans in all walks of life. In particular we have had to deal with the problems and, indeed, the injustices visited upon many American aviation accident victims by reason of the Warsaw Convention and its progeny which Montreal Protocols 3 and 4, now before this Committee, seek to amend and perpetuate.

As for my personal qualifications, I have been actively engaged in aviation accident litigation for nearly 30 years. Some of the cases in which I have been recently involved include the crash of the Turkish Airlines DC-10 at Paris in 1974 in which 346 people were killed, the collision of the KLM and Pan American World Airways airplanes at the Canary Islands in March of 1977 involving 577 passengers, the American Airlines DC-10 crash at Chicago which occurred in May of 1979, to name only three which are readily identifiable.

We are opposed to ratification of Montreal Protocols 3 and 4 which have been referred to the Senate for its "advice and consent." We earlier voiced our opposition to the Protocols at the hearings held by this Committee on July 26, 1977. Since 1977 no facts have developed to support the case for ratification. To the contrary, we believe the record demonstrates even more clearly now than in 1977 why the limited liability system which protects international airlines and hurts Americans and people of many other nations should be abandoned. No comparable program exists in United States domestic aviation. The domestic system works well and all victims of domestic commercial aviation accidents are fully compensated.

Montreal Protocols 3 and 4 amend the Warsaw Convention in these principal respects: air carriers' limitation of liability is increased to approximately $117,000, the limit is made "unbreakable" even if the carrier is guilty of willful misconduct, a radical departure from the present system and from the basic notions of fairness which underlie American jurisprudence. The present method of calculating the damage limit in terms of a gold value would be modified so that it would hereafter be calculated in terms of Special Drawing Rights, the "currency" created by the International Monetary Fund. Finally these Protocols authorize each nation to adopt such "supplemental" plans as they deem appropriate provided such plan does not impose a cost upon the carriers or increase their liability exposure.

In summary we are opposed to the ratification of Montreal Protocols 3 and 4 for the following reasons:

1. The Protocols do not advance the national interest of the United States.

2. The Protocols continue the system of limiting the liability of airlines to passengers for damages for personal injury and death sustained in the course of international transportation in the face of uncontroverted evidence that such extraordinary protection is economically unwarranted and unnecessary and is harmful to the interests of innocent passengers.

3. Under the present "Warsaw Convention" system, in light of the Montreal Agreement of 1966, carriers are "absolutely liable" for death or injury. American passengers whose recoveries are usually limited to $75,000, may avoid the limitation upon proving that the airline was guilty of "willful misconduct." The right gives most cases a settlement value above the limit. Montreal Protocols 3 and 4 would totally insulate airlines from liability in excess of approximately $117,000 regardless of the cause of the crash. It is unconscionable to limit the liability of an airline where it has been guilty of willful misconduct; yet these Protocols would do that.

4. In President Gerald R. Ford's message of January 14, 1977 transmitting these Protocols to the Senate for its "advice and consent" he wrote: "Montreal Protocols No. 3 and 4 are part of what would be a comprehensive package of benefits available to United States citizens traveling to and from the United States by air and to international shippers by air. This package would include a proposed domestic plan to supplement recoveries under the new protocols in cases of passenger injury or death, which is now being considered by the Civil Aeronautics Board."

The Department of State (DOS), the Department of Transportation (DOT) and the Civil Aeronautics Board (CAB) appearing before this Committee in June, 1977 testified that ratification of Montreal Protocols 3 and 4 was conditioned upon there being in effect a Supplemental Compensation Plan (SCP) which would afford American passengers the opportunity to obtain an additional $200,000 worth of "coverage" over and above the Montreal Protocol limitations, i.e. allowing the potential recovery up to $317,000. To our knowledge there is no viable Supplemental Compensation Plan in existence which presently has the endorsement or support of the CAB. Without such an unqualified endorsement it is, we submit, premature for this Committee to act in these matters.

In an attempt to satisfy the condition that there be a Supplemental Compensation Plan one was hastily approved by the CAB in July, 1977 without the benefit of public hearings and upon what has been virtually conceded to have been an incomplete and inaccurate record.

The SCP has been the subject of appellate review in the United States Court of Appeals for the District of Columbia (Docket #77-1728) since August of 1977. According to representations by the CAB made to the Court, not only is the SCP being "reconsidered" by the Board, but it is also exploring "alternative" methods to provide adequate compensation for American passengers. The Supplemental Compensation Plan as formulated would mandate payment of a $2.00 surcharge by passengers over and above their ticket price to create a fund to be managed by the Prudential Insurance Company to pay aviation accident victims their "provable" damages up to $200,000 above the $117,000 treaty limit. Some claimants such as infant children or elderly people would be contemporary standards receive limited, if any, benefits from the SCP; while a large segment of Americans and other passengers would be grossly undercompensated.

5. The SCP is part of a continuing effort by the airlines to shift financial responsibility for their negligence and willful misconduct to the passengers. Whatever surface appeal Montreal Protocols 3 and 4 and the SCP may have should disappear in light of these facts and upon recognizing that no industry in the United States is the beneficiary of such relief especially in the face of the complete absence of proof to support the need for such extraordinary treatment. This is not like an automobile "no-fault" system such as exists in some states. Automobile no-fault statutes permit full recovery in death and serious personal injury cases.

6. Since June of 1978 when the Department of State, Department of Transportation and the Civil Aeronautics Board were invited to respond to serious questions posed by some members of this Committee as a "beginning point for further consideration of the Protocols" there has been no comment by these departments. The complete absence of any effort by the Carter Administration and the Reagan Administration since 1978 to overcome the demonstrated unfairness of the Protocols and SCP, puts into serious question whether our government truly believes it can fairly argue that ratification of Montreal Protocols 3 and 4 is in our country's national interest. It seems to use that continuing our government's advocacy of the limited liability scheme as described in their protocols is a politically inspired gesture to the international aviation community before the inevitable and justifiable denunciation of the Warsaw System. Whatever "technical" provisions are advanced in their protocols can be implemented in ways which will not penalize Americans.

History of the limited liability system in international aviation

The Warsaw Convention was signed in 1929 and adhered to by the United States in 1934, when the aviation industry was in its infancy. It was intended to limit the liability of international air carriers for damages sustained by persons injured in international aviation accidents and for wrongful death so as to protect the infant industry from insolvency. Bearing in mind that Lindberg made his famous flight trans-Atlantic in 1926 and that Amelia Earhart made her flight shortly thereafter, it is clear that international air transportation was then considered to be a very risky enterprise. The longest international passenger flights from the United States at that time covered the 90 miles from Key West, Florida to Cuba. The Warsaw Convention created a presumption of air carrier liability and that the liability of the carriers was limited unless it could be shown that injury or death was caused by the airline's wilful misconduct. It also provided that each passenger be given a ticket with unequivocal notice advising of the limitation. Finally, the Warsaw Convention calculated the damage limitation in terms of a gold value which could be converted into any national currency. In dollars, the limitation of liability initially was $5,000 based upon a $20.67 per ounce gold price and was subsequently increased as the price of gold increased.

After World War II when international air transportation became commonplace, the limitation upon recoveries provided for in the Warsaw Convention was recognized to constitute a grave injustice, especially to Americans.

By the mid-1950's, there was general agreement in the United States that the $8,300 damage limitation (based upon a $35 per ounce gold price) was totally inadequate. As a result, the 1955 Convention at the Hague proposed amending the Warsaw Convention to double the damage limitation. In addition to doubling the liability limits in passenger cases to $16,600, the Hague Protocol also, while slightly modifying the wilful misconduct exception, preserved it.

For almost 10 years, the Hague Protocol languished on the Senate calendar with no action being taken. Finally, in an effort to get it through, the Administration combined it with a proposal for automatic accident insurance in the amount of $50,000 per passenger. In 1956 when it became clear that the automatic insurance proposal stood no chance of being approved by Congress, the Hague Protocol was withdrawn from the Senate. Most other countries who are parties to the Warsaw Convention have adopted Hague.

Faced with the fact that Congress would not adopt the automatic insurance legislation or the Hague Protocol and with the recognition that the Warsaw limit was totally inadequate, the U.S. Government denounced the Warsaw Convention in 1965 by actually filing documents in Warsaw, Poland which effective 6 months later would have resulted in U.S. non-participation in this treaty system. Prior to the effective date of the denunciation, however, the airlines engaged in international transportation, with the concurrence of our CAB, agreed to waive the Warsaw Damage Limitations up to $75,000 per passenger and further agreed to absolute liability up to the limit of $75,000. The U.S. "denunciation" of Warsaw was withdrawn.

This "interim" agreement became known as the Montreal Agreement and is presently incorporated in all airline tariffs. As under the Warsaw Convention, the $75,000 "waiver" is inapplicable where there is proof of wilful misconduct.

Beginning in 1968, meetings were held in an attempt to develop a new treaty designed to replace the Warsaw-Montreal scheme. The United States took the position that the limitation of liability had to be $125,000, but subsequently reduced its demand for a limitation of $100,000. The United States also took the position that any damage limitation would have to leave no more than 10 percent to 20 percent of the U.S. traveling public unprotected. Indeed, at a meeting of the Legal Committee of ICAO, the U.S. delegation stated that the minority left unprotected "should not be greater than 10 percent of the U.S. traveling public."

As I pointed out in 1977 to this Committee, I personally advised the State Department and the Interagency Group on International Aviation (IGIA) in 1968 that the economic data upon which they were basing their positions was inaccurate and urged that a new economic study of settlements and judgments in aviation litigation be conducted. Indeed, I advised the U.S. delegation that the recoveries in my office alone, from 1964 through 1970, proved that the Civil Aeronautics Board material had been grossly in error since my firm alone had more cases in certain categories than the CAB listed for the entire country.

Finally, the Administration requested the Civil Aeronautics Board to conduct a new, up-to-date study. When the information was evaluated, it showed that instead of $100,000 limit protecting 80 percent of the American flying public, it would leave 63.2 percent unprotected by 1970 standards and that the recoveries were rapidly rising. The 1970 statistics also showed that the average recovery for death in non-Warsaw airline cases was approximately $200,000 and had risen rapidly in each of the three preceding years. The new statistics made it abundantly clear that a $100,000 limitation would be a disaster for American airlines passengers.

The U.S. delegation now found itself in a terrible dilemma. The Government had been on record since 1968 as saying that any new treaty ideally should provide protection for 90 percent of the travelling public but that it was willing to compromise provided the limit was high enough to protect 80 percent. Therefore, the CAB statistics demonstrated that the $100,000 limitation was totally inadequate and that, again using 1970 statistics, it would require $400,000 limitation to protect 90 percent of the American passengers. However, it had also represented in its international meetings that the United States would accept the $100,000 limit. Instead of facing the problem directly and either re-filing its denunciation of Warsaw or, alternatively, insisting upon a treaty with either unlimited damages or a limitation which met it professed requirement, the United States agreed to a provision being inserted in the "Guatemala Protocol" which would permit any country to set up a supplementary insurance system provided that system did not add to the liability of the airlines.

As a result of the American retreat, the Guatemala City Protocol was signed on March 18, 1971, and it is now called Montreal Protocol #3. This Protocol, however, for the first time not only limited liability, but relieved air carriers of "unlimited" liability even if the carrier was guilty of gross and willful misconduct or failed to deliver a ticket providing notice of the limitation. In an effort to make the Protocol more palatable, it provided for an annual increase in the damage limitation of $12,500 after the 5th and 10th years that the treaty is in effect and a so-called "settlement inducement clause" which would give a court discretion, but not required, to award legal fees and costs if the carrier does not accept a claimant's offer to settle.

Since the Administration had publicly stated that the goal was to provide full compensation to at least 80 percent to 90 percent of the injured passengers, it, together with the airlines, began efforts to develop a Supplemental Compensation Plan. The Administration initially sought to interest the insurers to propose a plan which would provide for additional benefits up to $200,000 at a cost not to exceed $2.00 per passenger. The Air Transport Association was finally able to induce the Prudential Insurance Company of America to develop a plan which, on December 31, 1975, was submitted to the Civil Aeronautics Board for approval. This plan provided for an initial charge (which could later be increased) of $2.00 per passenger. The filing generated substantial opposition from the Bar Association of the City of New York, the Association of Trial Lawyers of America, the Aviation Consumer Action Project (ACAP), and others. Among other bases of opposition was the charge that the plan was illegal in that it lacked legislative authority, contravened the Federal Aviation Act and violated the anti-trust laws.

When the Supplemental Compensation Plan was approved by the Civil Aeronautics Board, an appeal of the Board's order was immediately filed in the United States Court of Appeals for the District of Columbia. Simultaneously, a petition was submitted to the Civil Aeronautics Board for reconsideration of the plan. Neither proceeding has advanced beyond the initial stage.

It was in this climate of uncertainty that this Committee conducted the initial hearing on Montreal Protocols 3 and 4 on July 26, 1977. There is even greater uncertainty today.

Airline liability insurance underwriters in this country and abroad have stated publicly that "unlimited" liability coverage may be purchased by airlines virtually at the same cost as "limited" coverage and that there is no shortage of capacity in the insurance industry to provide the necessary coverages

One of the central issues in this debate is whether "unlimited" liability coverage for passengers imposes an unreasonable cost burden upon airlines in comparison with the present limited liability system or as the system might be modified following ratification of Montreal Protocol 3 and 4 and implementation of the SCP. It would seem to be quite clear that if "unlimited" coverage on a per passenger basis can be purchased by airlines at low cost or at no appreciable increase over present insurance costs these treaties ought not to be ratified or the SCP implemented.

At the 1977 hearings by this Committee on these Protocols Senator Claiborne Pell asked a CAB spokesman, "What are the actual insurance costs for international airlines on a per passenger basis as of now; and with ratification of the Protocols, what would be the insurance costs afterwards"? The CAB representative replied, "We simply do not have any information on the insurance costs per passenger."

Were the airlines holding back this information from the CAB because disclosure would lead to rejection of the "Warsaw" System? Did the CAB in judging whether the SCP was in the "public interest" neglect to determine such an essential fact when it approved the plan in 1977? In either case this lack of information is a serious omission by proponents of these protocols which this Committee should not overlook.

The record now makes it clear that "unlimited" liability coverage for personal injury or death occurring by reason of air carrier negligence would cause no measurable increase in insurance costs to airlines.

What are the facts about the "cost" of airline liability coverage?

In February, 1978 the "Future of Aviation Tort Law" was discussed at Monaco by airline insurers from London and the United States together with many of the most active members of the aviation litigation bar. The Warsaw Convention limited liability system was discussed in the specific context of the cost of unlimited liability insurance coverage. John Brennan, President of United States Aviation Insurance Group, a leading aviation liability insurance underwriter in this country stated:

> When you talk about limitations, you are talking about costs. I don't see the savings in costs being meaningful if in fact they exist at all. Today, when we talk about the Guatemala Protocol and the supplemental compensation scheme and devices of this sort, we are talking about possibly saving a fraction of the cost of unlimited liability, which is now approximately forty cents per passenger per round trip. In fact there would be no saving at all under current market conditions.
>
> I might indicate that in the United States, as I understand it, there is a particular philosophy behind our tort system, a system where we do not have a limit. We believe in compensation of the injured to the extent that they are injured. And we like to make the party who is in control of the activity or instrumentality pay that price, if we can, because we are trying to get more than one bird with the same stone.
>
> We are trying to reward those people who provide a greater level of safety in their operations and produce safer products. We would expect that the people who do not do so would incur greater costs.
>
> I think that is a benevolent approach.
>
> It is incredible to observe the amount of misinformation that is circulated regarding the costs of aviation insurance. For instance, during 1977 the U.S. airlines paid about $.40 per passenger per round trip for liability insurance limits of up to $400,000,000 per occurrence. 90 percent of these flights were domestic so therefore involved an unlimited liability exposure. Contrast that $.40 charge with the $2.00 per passenger round trip charge that advocates of the Supplemental Compensation Plan to the Guatemala Protocol wish to charge for $200,000 excess of $100,000 per passenger. I am still laboring mightily to understand that program.

There was no dissent.

Three years later in March, 1981 at a similar conference at Tobago attended by international aviation insurance underwritiers, lawyers and the then Chairman of the Civil Aeronautics Board, Marvin Cohen, Mr. Brennan was again asked about the cost of unlimited liability insurance coverage. He said:

> Speaking for my own company, United States Aircraft Insurance Group, in the event that there was unlimited liability in international air transportation, we would see the smallest, if any, increase in the premiums. That's the first thing.
>
> As the next side of this point, I would like to mention a couple of figures that might be helpful. These are actual figures that apply to liability premium that was paid by the domestic trunk airlines in the United States for their liability insurance in 1970 compared to 1980. The 1970 total liability premium of the leading American trunk airlines was 60 million dollars. For that 60 million dollars, each of those airlines had a policy of up to 100 to 125 million dollars.

> In 1980, those same airlines paid approximately 30.6 million dollars for up to 400 to 500 million dollars in liability insurance. In 1970, the top 25 non-U.S. airlines paid a total of some 47 million dollars for approximately 100 million dollars in liability coverage. In 1980, that total figure was down to 33.2 million dollars and that purchased 400 to 500 million dollars of liability coverage.

There was no disagreement voiced by any of the underwriters present.

The absence of evidence in 1977 that there was any economic necessity for perpetuating the limited liability scheme was one of the factors which prompted Senators James B. Pearson and Richard Stone to express serious "concerns" about Montreal Protocols 3 and 4 and the SCP in a July 9, 1978 letter to the Chairman of this Committee.

Since it is universally understood that it is not the airlines, but their insurers, who pay "damages" in aviation accident cases and general agreement among the insurance underwriters that unlimited coverage can be easily and inexpensively purchased, it is remarkable that anyone should seriously advocate perpetuating the Warsaw limited liability system. No less startling is the fact that the proposed SCP $2 mandatory surcharge is more than double the cost of unlimited coverage on a per passenger basis.

In short, there is no economic justification for the limited liability system today and we believe it is time to terminate it.

The $317,000 recovery limit would grossly undercompensate many Americans

The $317,000 limit of coverage provided by the Montreal Protocol-SCP "package" was inadequate when formulated and was based upon an unsound, erroneous and incomplete statistical base compiled by the Civil Aeronautics Board.

The United States has long asserted that one of its objectives was to secure reasonable damages for victims of air disasters in international transportation. The U.S. denunciation of the Warsaw Convention in 1965, later withdrawn when the Montreal Agreement was signed in 1966, and recognition in 1970 and 1971 that the $100,000 Guatemala Protocol was inadequate compensation for American victims is proof of this overriding concern.

A decade after the Guatemala Protocol limit of $117,000 was proposed it remains unchanged though inflation has eroded more than one-half its purchasing power. In the half decade after the SCP was proposed the median income in the United States has increased by 50 percent. Paralleling these increases, recoveries in serious personal injury and death cases have increased substantially. A $300,000 award today has the approximate purchasing power of $150,000 award in 1971. Recovery for a "breadwinner" or head of household survived by a spouse and children, for example, now routinely is substantially in excess of $317,000 when death occurs in a commercial aviation disaster. "Average" recoveries are now near $400,000. These are facts which all people knowledgeable in the field recognize and cannot challenge in good faith.

Clearly, though, the trend has and is likely to continue to be toward higher recoveries. No accurate study by the CAB has ever been made. Today a greater number of cases than ever before are concluded at levels higher than $317,000.

The well documented study of the CAB statistics of recovery levels submitted to this Committee by Elias J. Saad and John R. Benn, in contemplation of the 1977 hearings, compels some alarming conclusions. They pointed out that the CAB statistics used to suggest "adequate" levels of recovery were themselves inadequate and erroneous. Their most recent computations significantly omitted settlements which substantially exceeded those upon which their conclusions and "averages" were based. In this context, one must conclude that the CAB studies upon which the CAB projected the level of benefits required to adequately compensate American airplane accident victims is, at best, inaccurate, and probably useless.

John Martin, an attorney speaking to this Committee in 1977 on behalf of the Association of the Bar of the City of New York reported settlements which even then placed in serious question the correctness of the CAB's figures. He said:

> For example, three recent accidents. The Eastern Airlines Everglades accident, where there were some 176 people on board the aircraft. Within 2 years all or substantially all of those cases were settled, for an average settlement of about $270,000, 40 of which exceeded $325,000. The Eastern Airlines Charlotte accident. I was involved in Everglades, but not in Charlotte. In Charlotte, there were 78 passengers. All of the cases except three have been settled, and for an average settlement of approximately $280,000. A third of those settlements, 24, were over $325,000. All of these settlements were made well within 4 years.

The recoveries in recent aviation accident cases involving the deaths of Americans makes this self-evident and makes the unfairness of the SCP even more obvious.

When the litigation arising out of the Turkish Airlines DC-10 crash at Paris of March, 1974 was concluded in 1977 and all 346 death claims resolved, involving citizens from a score of nations, the trial judge Hon. Peirson M. Hall summarized the levels of recovery. His analysis disclosed that approximately 70 of the claims were settled for sums ranging from $300,000 to nearly $1,000,000.

In 1978 and 1979 there were at least 13 verdicts or settlements in cases arising out of the Pan American Airlines crash at Pago Pago in January, 1974 that exceeded $300,000; one as high as $1,125,000.

Thus far, there have been numerous settlements or jury verdicts in the aftermath of the Chicago-DC-10 crash of May 25, 1979. The average loss payment in this DC-10 crash exceeds $400,000.

These figures are merely examples of recovery levels to demonstrate that certainly in this country the $317,000 Montreal-SCP ceiling is an arbitrary and unacceptable limitation which would undercompensate many American aviation accident victims.

Indeed, given the Department of State's own "criteria" that any "package" would have to adequately compensate 80-90 percent of Americans, Montreal Protocols 3 and 4 ought not to be ratified.

Elimination of the "Willful Misconduct" exception which exists in the present "Warsaw" system is not in the national interest

No national interest of the United States is served by extending to commercial airlines limited liability where "willful misconduct" by an airline or its employees results in the injury or death of passengers. The "willful misconduct" exception to limited liability was a key provision in the Warsaw Convention. The exception was preserved in the Hague Protocol of 1955 and was unaffected by the Montreal Agreement of 1966. It is hard to perceive how the American passenger can possibly be deemed to benefit by its elimination. A suggestion that by virtue of the Guatemala Protocol airlines are "absolutely liable" and that it is a "new" benefit is misleading. "Absolute liability" is not a benefit in the real world of 1981; it is already a fact by reason of the Montreal Agreement of 1966.

The benefits payable under the SCP have no financial impact upon the carriers since the SCP is fully funded by the $2 (initial) passenger surcharge.

Our American system of jurisprudence has always held a wrongdoer responsible for his actions. These protocols do precisely the opposite.

Furthermore, it is the airlines' insurers' awareness of the fact that many accidents are attributable to the willful misconduct of airline personnel or their reckless disregard for safe practices which gives aviation accident claims a settlement value which usually far exceeds the present $75,000 limitation prescribed by the 1966 Montreal Agreement and indeed the $317,000 proposed "package" limit.

This Committee, we suggest, should also observe that calculating the Warsaw Convention damage limit in terms of the market value of gold and not SDR's as these Protocols require would accomplish the sum of the objectives of the Protocols and preserve the willful misconduct exception. One of these objectives is to increase the treaty-prescribed damage limit to approximately $117,000, the present dollar value of 100,000 Special Drawing Rights.

Article 22 of the Warsaw Convention states that an air carrier's liability shall not exceed 125,000 "francs" and that each franc for the purpose of the Convention is deemed to be the equivalent to an imaginary gold coin "consisting of 65½ milligrams of gold at the standard fineness of nine hundred thousandths."

If the damage limitation prescribed in Article 22(1) of the Warsaw Convention which, according to Article 22(4), must be calculated by reference to a gold value is determined by reference to the market value of gold, the "Warsaw" limit would be approximately $117,000.

The existing $10,000 Warsaw Convention damage limit derives from a 1974 CAB calculation based upon a $42.22 U.S. "official" gold price.

Effective in 1978, The Par Modification Act of 1976 passed by Congress eliminated all references to an "official" price of gold as a feature of U.S. domestic or international monetary policy. However, because our CAB has thus far declined to rescind its 1974 Order which stated that the Warsaw Convention limitation is equal to $10,000, the international airlines have steadfastly refused to voluntarily increase their limit of liability to the $117,000 level which the market value of gold now requires.

Arguments have been made in two aviation accident cases pending in federal courts in New York and California to secure judicial approval of the "market value of gold" calculations in this context. Decisions should be promulgated in the near future.

The SCP may never become effective

The SCP is being challenged in the courts. As recently as August 20, 1981, the CAB advised the Clerk of the U.S. Court of Appeals for the District of Columbia that the SCP is being "reconsidered." Montreal Protocols 3 and 4 should not be acted upon with the SCP in such an unsettled state.

We have argued that the SCP should not be permitted to become effective for several reasons in addition to the inadequacy of the benefits provided.

The CAB lacks statutory authority to approve the SCP. The Federal Aviation Act of 1958 (49 U.S.C. § 1301 *et seq.*), contains no provision which authorizes the Civil Aeronautics Board to approve a private agreement which would give air carriers the power to impose a mandatory $2 charge on all international air travellers purchasing tickets in the United States for international transportation to fund limited insurance benefits for death or personal injury. Such an agreement, to be effective, requires an Act of Congress. An agreement may not be approved under § 412 of the Act unless such an agreement has a statutory foundation.

The proposed Montreal Protocols, even assuming ratification, do not authorize a non-statutory scheme of supplemental benefits, and particularly one which would impose a non-voluntary charge on passengers. It merely amends the Warsaw Convention to permit a country, pursuant to its laws, to establish a supplemental plan. Article 35A of the Guatemala Protocol provided:

> "No provision contained in the Convention shall prevent a State from establishing within its territory a system to supplement the compensation payable to claimants. . ." (Emphasis supplied.)

Absent this provision itself there is no treaty that authorizes a supplemental compensation plan or the imposition of a mandatory charge for insurance on passengers.

In short, since Congress has not enacted any law or otherwise acted in a manner which allows air carriers to compel air passengers to buy limited insurance coverage and thereby relieve the carriers of the major burden in their tort liability, the CAB lacks the authority to approve the SCP.

The proposed SCP violates the anti-trust laws. The purpose of the United States' anti-trust laws is to preserve a system of free competition and to protect the public from monopolies and restraints of trade.

The proposed SCP on its face is repugnant to the anti-trust laws. It is a non-competitive "contract" between the airlines and Prudential which requires airplane passengers to pay a premium arbitrarily fixed to purchase insurance coverage in excess of the Guatemala Protocol limit as a condition of international travel. Because of its anti-trust overtones the SCP must be disapproved if it does not fall within a recognized exemption and serve the "public interest."

Without question, however, whatever the CAB's statutory authority may be to confer an anti-trust exemption upon airlines in matters relating to airline "consolidation merger or control" or other corporate relationships, it has no authority to grant an anti-trust exemption to the Prudential Insurance Company.

Among the most obvious anti-trust and anti-competitive consequences of the SCP are the following:

1. International airline passengers will be required to purchase accident insurance at a rate not influenced by the marketplace and from one company only.
2. Prudential will effectively monopolize the international aviation insurance market for death or injury. As a practical matter, when advised of the purpose of the $2 surcharge passengers will not purchase alternate coverage even if the alternate coverage affords better and more certain benefits.

These anti-competitive consequences of the SCP do not "secure important public benefits." They secure a system of limited liability on the part of airlines (as opposed to unlimited liability, which should be the rule) and substitute a system of limited mandatory insurance for the unlimited liability regime which should exist.

Furthermore, both the Carter Administration and Reagan Administration have been advocates of deregulation of the airline industry. The SCP in that regard is contrary to Administration policy.

Insufficient economic data was submitted to the CAB to warrant the radical limitation of rights which would be triggered by approval of the Guatemala Protocol and SCP. We respectfully submit that this Committee also has not been presented with sufficient economic data to justify an extenstion of limited liability system of airlines, and in particular, the system contemplated by the Montreal-SCP combination.

Logic, historical precedent and fairness to Americans dictate that such a showing be made.

The whole concept of "limited liability" for airlines has been predicated upon international airlines' asserted financial inability to sustain the losses which claims for death or personal injury of passengers might impose upon them. Nevertheless, the ATA has stated in its application to the CAB for approval of the SCP that there is no "economic data or other material which applicants wish the Board to officially notice." ATA Application p. 5. It may reasonably be assumed that ATA's unwillingness to file economic data is based upon its knowledge that such data will render untenable the argument that perpetuating limited liability and the $2 surcharge is economically necessary.

Serious questions must be resolved before this committee should act

The Montreal-SCP "package" should not be considered until a broad range of substantive issues are resolved. It was for precisely this reason that Senators Pearson and Stone asked in 1978:

1. Is the proposed ticket surcharge excessive in view of the proposed coverage benefits to the international air traveller?
2. Is it in the best interests of consumers of air transportation services to be denied the right to bring suit against an air carrier or foreign air carrier for damages resulting from injury or death in an airline accident involving international air transportation, even in cases of gross negligence and wilful misconduct?
3. Does the Supplemental Compensation Plan and the limits of recovery provided in the Protocols ($317,000 for death) represent a fair and reasonable recovery limitation for American air travellers?
4. Should the Committee approve the Protocols when the Supplemental Compensation Plan (SCP), which is inextricably tied to the Protocols, is being challenged in the Federal Courts and before the Civil Aeronautics Board?
5. Does current law or the proposed Protocols provide adequate requirements that passengers receive notice of the limitations of liability applicable pursuant to the Warsaw Convention before their departure?"

More recently in September, 1981 similar questions were posed by the Association of Trial Lawyers of America.

1. At the June 26, 1977, hearings DOS, DOT, and the CAB agreed that Montreal Protocols 3 and 4 were inextricably tied to a Supplemental Compensation Plan which was approved by the Civil Aeronautics Board and designed to enable victims of international aviation disasters to recover provable damages up to approximately $317,000.

We understand that the Supplemental Compensation Plan has been the subject of an appeal filed in the United States Court of Appeals for the District of Columbia in 1977 and that to date the Civil Aeronautics Board has routinely postponed filing its "record" in the matter on the ground that it is reconsidering the Supplemental Compensation Plan and exploring other alternatives to it. Is it not premature for the Committee to consider Montreal Protocols 3 and 4 when the Supplemental Compensation Plan which was to be an "integral" part of the package is in such an unsettled state?

2. Representatives of the American and London airlines' insurers have recently stated publicly that the cost of liability insurance coverage for airline passengers can and is being purchased for less than $1.00 per round trip per passenger and that "unlimited" liability insurance coverage would cost no more. They have also indicated that the insurance industry has full and adequate capacity to provide unlimited coverage for international air carriers. What economic justification is there for limiting recoveries by American international airline passengers for wrongful death and personal injury in this context and, indeed, what justification is there for the $2.00 ticket surcharge contemplated by the Supplemental Compensation Plan as proposed by the CAB?

3. Attorneys for both the airlines and aviation accident victims claim that it is the limited liability system spawned by the Warsaw Convention which Montreal Protocols 3 and 4 amend which impedes the speedy settlement of claims since extraordinary measures must be taken to obtain full and fair compensation for aviation accident victims. In any event, the hearings of 1977 on the Protocols produced testimony that settlement of claims today frequently is accomplished within months of an aviation disaster. What real evidence is there that the Warsaw Convention system as modified by the Protocols would promote early settlement of cases?

4. Inflation and the corresponding devaluation of the dollar and other national currencies since 1971 and particularly the substantial loss in the purchasing power of the dollar since 1976 suggest that even if the levels of compensation provided by the Montreal Protocol—SCP package were deemed adequate when

formulated, should not the question of "adequacy" of coverage for the majority of American passengers be reviewed?

5. Would the abolition of the limited liability system that presently prevails in international aviation have any meaningful effect or impact upon the well organized uniform rules adopted and promulgated by the International Civil Aviation Organization (ICAO)?"

We believe these questions should be answered for the answers may well persuade this Committee to decline action on these treaties or recommend that the "Warsaw" system has outlived its purposes.

CONCLUSION

Montreal Protocols 3 and 4 are a self-serving, selfish effort on the part of airlines to secure a limit of their own liability, and should be rejected by the Senate.

The treaties serve no demonstrated "national interest", rather they serve the parochial interest of the airline industry which does not require the protection the treaties afford them by any measure of economic necessity.

The Protocols before this Committee rest upon a supplemental plan which itself has major substantive deficiencies and which is being challenged in the courts. This Committee has been presented with this "package" because it is the only way the airlines can possibly achieve United States ratification of the Protocols and without the Warsaw Convention the system of limited liability will collapse.

For all of the foregoing reasons, I respectfully suggest that this Committee, concerned as it is with our national interest and the rights of Americans, reject Montreal Protocols 3 and 4 and recommend that the United States denounce the Warsaw Convention.

Senator **Kassebaum**. Thank you, Mr. Konigsberg.

Mr. Gray, speaking on behalf of the American Bar Association, could you summarize in about 10 minutes the positions we have heard so far.

STATEMENT OF ROBERT REED GRAY, ON BEHALF OF THE AMERICAN BAR ASSOCIATION, WASHINGTON, D.C.

Mr. **Gray**. I will try to do that, and will respond to some of the things Mr. Konigsberg has said.

Madam Chairman, my name is Robert Reed Gray. I am an attorney in Washington, appearing on behalf of the American Bar Association [ABA], which urges the Senate to give its advice and consent to what is generally referred to as the Guatemala protocol of amendment to the Warsaw Convention. It is before you today as protocol 3 of Montreal, but most of us refer to it as Guatemala.

The ABA is the largest voluntary, and probably the most fully representative, association of lawyers in the United States. Its present membership, I understand, is about 275,000. Mr. Charles Brower, now the chairman of the Section of International Law, who testified for the ABA in 1977 before this committee, gave testimony at that time and I fully endorse and support what he said then.

I have a prepared statement which has been submitted to the committee, but rather than read it I would like to summarize a few salient points and then refer to some arguments tht I have heard here today. So if my prepared statement could be accepted into the record with the attachments, I would appreciate that.

Senator **Kassebaum**. That will be done.

Mr. **Gray**. The attachments include both the recommendation and report of the Section of International Law of the ABA in support of the Guatemala protocol and also the "Report and Recommendations of the . . . Standing Committee on Aeronautical Law" on that same subject. Now, those two reports, together with an opposing report of what was then known as the Insurance, Negligence and Compensation Section, which is now called the Tort and Insurance Practice Section, were before the house of delegates in 1977.

The case for ratification of the Guatemala protocol was presented to the house of delegates by Judge Re, who is the respected Chief Judge of what is now the Court of International Trade. The ABA House of Delegates overwhelmingly rejected the negligence lawyers' report and approved the International Law Section's report by a vote of 209 to 81, or about 2.4 to 1.

I think any explanation from me as to how the Guatemala protocol and supplementary compensation plan work would be superfluous. You probably are going to hear some of that from the ATA and from Prudential, who I understand will follow us. But I think the conclusions expressed in the International Law Section's report as to the adverse results which would flow from failure to approve the Guatemala protocol are of considerable interest.

First, such a failure would reject a uniform international system of absolute liability with expanded coverage and expanded jurisdiction, in favor of a system of assured protracted litigation.

Second, it would reject a system whereby U.S. citizens making an international air trip, whether touching the United States or not, are assured of swift, sure and sufficient recovery with no defense save that of contributory negligence—trading that system for one of expensive litigation and extended delay, with the possibility of no recovery in the event of the air carrier's proving an act of God, insurrection, sabotage or the like. Looking only at the delay aspect, at current money market rates a recovery of $320,000 right now would return over $100,000 in interest in 2 years if invested at only 15 percent per annum, and that is not unusual these days.

The suggestion was made by Mr. Konigsberg that the passenger needs a lawyer to show his damages. That may very well be true. However, the family lawyer probably is more intimately familiar with the needs of the family and what the earning capacity was than someone who comes in at the last minute. Certainly the expense of that kind of lawyer should be a lot less than that of a very capable trial counsel expert in aviation accident cases.

Second, Mr. Konigsberg also suggested that the Athens and Near East cases were fought by the airlines. They could not be fought under the protocol. There is absolute liability. There is no defense, with the sole exception that the passenger contributed to it, that the passenger was the one who threw the hand grenade.

Third, of international importance, the United States would be renouncing the world's most widely accepted private law treaty. It is one that has been adhered to by over 100 nations. The last number I heard I believe was 119. They are on both sides of the Iron Curtain. They are developed nations and undeveloped nations. Basically the whole world supports this.

It is a treaty on which the United States has been working for over 20 years and through five administrations in an attempt to reach an expanded agreement internationally rather than simply to go its own way and drop out of the Warsaw system.

Mr. Konigsberg suggested that he had not heard any reason as to why there is a diplomatic benefit. From my experience in the field, it seems to me that the United States is the one that basically forced this down the throats of all the other nations in the world. Predominantly, they thought it was much too high. The United States did get agreement, and I think if we back out of it now it will have an adverse effect.

Similarly, the administration just recently asked the Civil Aeronautics Board to defer action on what was called the "IATA show cause order" in order to better put the United States in a position to negotiate and work with our foreign counterparts.

So in our view the Guatemala protocol deserves ratification by the United States. As to the arguments to the contrary, namely that the facts have changed, I am a member of both the International Law Section and the Section of Tort and Insurance Practice. I have seen nothing circulated in those sections which would lead me to believe that the factual situation is significantly different now from what it was in 1977.

I believe that many Trial Lawyer Association members are also members of the Tort and Insurance Practice Section. So if there had been any significant differences, it seems to me they would have been called to our attention.

More significantly, it is my understanding from figures which I think the ATA has that during the past 3 years the recoveries have been well within the established criteria which the Government itself established for an acceptable supplemental compensation plan. And that does not even take into account the unlimited coverage of the supplemental plan for medical and hospital expenses.

So it seems to me that the complaint of the Trial Lawyers Association today is the same as it was 4 years ago, namely that the Guatemala protocol and the supplmental compensation plan may not be perfect. It has indeed been recognized by the Government that there may be a few individuals who would not be fully compensated by Guatemala, but those people can be expected to have or obtain personal insurance commensurate with their needs. This, it seems to me, is far preferable to burdening the vast majority of passengers with the expense of the cost of more expanded coverage.

It also seems to me that the passengers who are covered by the Guatemala protocol and the supplemental plan are the ones who need it the most. Someone who is making a good salary, making a good income, does not need the money right now. It is the poorer fellow who is just struggling along and who may not get much of a recovery who needs it now. He needs it now, he needs it fast. He needs it to be certain, swift, sure and sufficient. Those were the grounds upon which the Government said that the supplemental plan and the Guatemala protocol must be negotiated and established, and that was what was done.

Second, it seems to me you have to balance against a few who may not be fully compensated the fact that jurisdiction and recovery are enhanced for a substantial group of people who might not otherwise be able to recover in the U.S. courts. Just this last week I was looking through some aviation law service advance sheets and came across two cases which I think bear on this point.

The first was in the District Court for the Southern District of New York and involved a claim in connection with a flight between two non-U.S. points. The suit was dismissed by the court and it said, and I quote:

> Since this court is not a court of defendant's domicile or principal place of business, nor a court of the place where defendant has a place of business through which the contract of carriage was made, not a court of the place of destination, it lacks treaty jurisdiction, and this action will not lie.

Had the Guatemala protocol been in effect, there would have been jurisdiction in the New York court. And although that case involved a baggage claim, the principle is equally applicable to one for personal injury of death and it would be a significant expansion of coverage for U.S. citizens.

The second case was in the U.S. Court of Appeals for the District of Columbia Circuit and, while the outcome probably would not be affected by the ratification of the Guatemala protocol because it was a trip wholly within a foreign country, it was not international, the court's comments on the benefits of U.S jurisdictions are instructive. The court said in part, and I quote:

"We fully understand why the plaintiffs here seek a United States forum for adjudication of the wrongful death claims they wish to assert. The Taiwan legal system is unfamiliar to them and, even if they establish serious fault on the part of FEAT"—that was the airline—"they cannot reasonably anticipate U.S. style damages abroad."

In short, the Guatemala protocol would bring more situations under U.S. jurisdiction and allow swift, sure and sufficient compensation to U.S. citizens not otherwise protected.

In closing, I would like to reiterate a quote with which Mr. Brower concluded his presentation in 1977. It was an admonition of President Roosevelt in his last State of the Union Message. I quote:

"Perfectionism no less than isolationism or imperialism or power politics may obstruct the paths to international peace."

I would only add that further delay in approval of the Guatemala protocol only delays a much improved system for compensatory recovery for persons injured or killed in international aircraft accidents. In this regard, it might be noted that had the Senate in 1977 given its advice and consent, we would be but 1 year away from a reconvened conference pursuant to the protocol itself wherein the limits would be increased by an additional 12,500 special drawing rights, absent a two-thirds vote to the contrary.

So the American Bar Association strongly urges this committee and the Senate to give advice and consent to ratification of this protocol.

[Mr. Gray's prepared statement follows:]

PREPARED STATEMENT OF ROBERT REED GRAY

Chairman Kassebaum and Members of the Committee, my name is Robert Reed Gray, and I appreciate your invitation to the American Bar Association to express its support for Senate advice and consent to the Additional (Montreal) Protocol No. 3 of 1975. I have the honor of appearing today on behalf of the 275,000 member American Bar Association. The ABA represents the full spectrum of the legal profession in this country and is the largest voluntary professional association in the world.

I am in the private practice of law in Washington, D.C., in which capacity I have represented an array of clients on both sides of domestic and international aviation cases as well as in accident investigations before the NTSB. I appear today in my capacity as chairman of the International Transportation Committee of the Section of International Law, and was involved in that Section's development in 1976–77 of the resolution and report favoring the ratification of the Montreal Protocol. During the period 1951–1955 I served some three years on the staff of the General Counsel of the Civil Aeronautics Board in the International and Rules Division.

I will outline briefly today the history of, and the reasons for, the American Bar Association's support for the Additional (Montreal) Protocol No. 3 of 1975 amending the Warsaw Convention of 1929 as amended by the Hague Protocol of 1955 and the Guatemala Protocol of 1971. The 1977 testimony by Charles N. Brower on behalf of the American Bar Association before this Committee, in conjunction with the other witnesses then appearing, constitute a full record of the importance of prompt action by this Committee and the full Senate giving its advice and consent to the President on the Guatemala Protocol. I will not reiterate Mr. Brower's testimony here, although I would highly recommend it to you and adopt all that he said.

In February 1977, the Association's House of Delegates by voice vote rejected a resolution which would have put the ABA on record in opposition to the Guatemala Protocol and the Supplemental Compensation Plan. By the resounding vote of 209–81, the Association then voted in favor of a resolution supporting Senate advice and consent to this Protocol. It is perhaps useful for me to point out to this Committee and the full Senate that all arguments on both sides of this issue, and every conceivably interested parites' point of view in this debate were laid before the ABA. Consideration of the relative merits of the Guatemala Protocol involved many dozens of attorneys and various entities within the ABA and consumed nearly a year's effort.

I have attached to my statement a brief historical outline of the ABA's thorough study on this issue (Exhibit A). I also attach a copy of the ABA Resolution of Approval (Exhibit B) which includes the extensive report of the ABA's Section of International Law, which was adopted by a vote of 16 to 1 by the Section's policy-making Council. I also attach a report by the ABA's Standing Committee on Aeronautical Law (Exhibit C), in strong support of the position of the Section of International Law. The attached report of the Section of International Law provides a useful summary of the Guatemala Protocol and its related Supplemental Compensation Plan, and a more thorough analysis than I will offer today of the compelling reasons why this Committee and the United States Senate should promptly give their advice and consent to ratification of this Protocol.

I emphasize the word "promptly" against the background of this Committee's last consideration of the Guatemala Protocol some four years ago and, for example, the airline accident in Tenerife at about the same time. It took over two years after that tragedy to settle or determine most of the claims, but I understand there are still claims which are subject to judicial appeal. I further understand that over 96 percent of the claims settled were for $325,000 or less, roughly the amount which would be permitted under the Guatemala Protocol coupled with the Supplemental Compensation Plan. If virtually all of the claimants would have received swift and full satisfaction under the third-of-a-million dollar limit of the Guatemala Protocol, the question appropriately is raised, "Why did it take so long?"

If the Senate had given its advice and consent to the Guatemala Protocol at the time of this Committee's last hearings, there is no evidence to suggest that the sufficiency of the settlements would have been any less than in fact has been the case, but there is strong evidence to suggest that the claims would have been settled much more expeditiously—the vast majority within six or eight months. The interest alone on the cumulative settlements of the Tenerife accident is staggering, and should be viewed as an amount of money withheld from the claimants merely to permit the lengthy adversarial process to obtain for the claimants that which would be their due under the Guatemala Protocol.

It is this swiftness, sureness and sufficiency of recovery which presents the clearest case for approval of this Protocol. The benefits to the traveling public—and particularly the U.S. traveling public—are the sureness of compensation for death or injury instead only a likelihood of compensation; the imposition of strong incentives encouraging settlement of claims within months instead of years; and the certainty of complete compensation for all medical costs as those costs are incurred and for the full compensation for wrongful death in the overwhelming majority of cases. The legal antecedents to the Protocol provide an important perspective to understand the significance of these benefits.

The underlying legal document which the Guatemala Protocol improves is the Warsaw Convention of 1929, formally known as the "Convention for the Unification of Certain Rules Relating to International Transportation by Air." This convention is the most widely adopted private law treaty in history, to which the United States became a party in 1934. Over one hundred nations now are parties to the treaty, which was developed during the infancy of aviation to promote worldwide uniformity of rules concerning passenger and cargo transportation by air. Of greatest significance, the treaty created international uniformity regarding airline liability, rather than subjecting the victim of an aviation accident arbitrarily to the laws of the particular jurisdiction where the ticket was purchased, the accident occurred, or some other event took place. Since the domestic law of various foreign countries provides totally inadequate recovery for personal injury or wrongful death, the drafters of the Warsaw Convention recognized the importance of uniform rules as to the rights and obligations between air carriers and the traveling public.

This uniformity reduces the maze of conflict of law questions which would otherwise confront passengers, shippers and airlines and, of particular importance, imposed on the air carrier a rebuttable presumption of liability, which the Guatemala Protocol would take a step further by converting into a regime of absolute liability.

As with most successful treaties, the foundation for the initial Warsaw Convention and the subsequent amendments made to it is the successful balancing of competing interests. On the one hand, victims of international airline accidents or their decedents wish only to be adequately compensated for their loss in a timely fashion. On the other hand, airlines have a major interest in promptly and adequately settling claims if their incentive to do so is a reasonable limit on their ultimate liability. The interests of both parties, therefore, is aptly described by the oft-quoted maxim, "justice delayed is justice denied."

The initial limitation on airline liability imposed by the Warsaw Convention long ago became insufficient to meet the level of claims of United States citizens and was updated in 1966 when the Civil Aeronautics Board approved the Montreal agreement. Air carriers covered by this agreement already have waived all of their defense available under the Warsaw Convention and provides a maximum carrier liability of $75,000. Because of the insufficiency even of this increased amount, the Guatemala Protocol of 1971 and the Montreal Protocol No. 3 of 1975 would provide up to $120,000 in airline liability, a settlement inducement clause to prompt the settlement of a claim within six months, provisions facilitating suit against foreign airlines in the United States, and the recognition of the right of participating nations to impose Supplemental Compensation Plans. Such a plan was developed by the United States and approved by the Civil Aeronautics Board and provides, in pertinent part, an additional $200,000 recovery without reference to fault and unlimited medical and hospital benefits payable when incurred.

The American Bar Association was persuaded in 1977 that this package of benefits equitably balances important competing interests and demands the support of the legal profession. That commitment remains as strong today as the essential components of the Protocol: liability of the airlines for death or injury without the need to prove fault; unlimited medical and hospital expenses payable to the injured accident victim when incurred; a ceiling of up to a third of a million dollars in liability payments to the plaintiff; and broader coverage and more certain protection for United States citizens flying worldwide.

The United States led the world into the twentieth century phenomena of mass commercial flight and our role as a world leader in improving the technology and safety of commercial aviation certainly will continue. However, such a position of leadership imposes the requisite responsibilities, and in this regard the United States has led the other countries of the world—often with a substantial effort—to recognizing the importance of establishing a regime of sure, swift and adequate compensation for victims of airline accidents. Most certainly the continued usefulness of the Warsaw convention rests on the ability of the national community to bring the Convention up to date. The Guatemala Protocol as amended by the Montreal Protocol, and supplemented by the Supplemental Compensation Plan in the United States, is just such a needed reform. Should the United States Senate not promptly give its advice and consent to the ratification of the Protocol the entire Warsaw regime will continue to rest on rules adopted in 1929, or be abandoned in a denunciation of the Warsaw Convention. Should we fail to ratify the Protocol promptly, the loss of our leadership in the international aviation community would be dwarfed by the likely collapse of international cooperation in aviation fostered by the Warsaw Convention.

The American Bar Association, after extensive study and debate, can discern no reason for delaying ratification further. On behalf of the Association and the nation's legal community I offer the ABA's continuing assistance to bring this matter promptly to the Senate floor and to urge swift approval of it.

[Exhibit A]

HISTORY OF AMERICAN BAR ASSOCIATION SUPPORT FOR UNITED STATES RATIFICATION OF THE GUATEMALA PROTOCOL

May 1976

Section of Insurance, Negligence and Compensation Law's Aviation and Space Law Committee Approved May 8, 1976, a resolution opposing ratification of the Protocol. This position subsequently was endorsed by a mail vote of the Council of the Section, and was submitted to the Association's House of Delegates.

August 1976

Standing Committee on Aeronautical Law sponsored a program during the ABA Annual Meeting for the purpose of debating the relative merits of the Protocol. Participants included representatives of the U.S. Department of State, plaintiff's attorneys involved in aviation litigation, the insurance industry, airlines and foreign governments.

August 1976

ABA House of Delegates deferred action on the recommendation of the Section of Insurance, Negligence and Compensation Law in opposition to the ratification of Guatemala Protocol No. 3 and to approval of the Supplemental Compensation Plan.

December 1976

A special subcommittee of the Standing Committee on Aeronautical Law concluded its study of the Protocol and recommended endorsement of the Protocol and Supplemental Compensation Plan (SCP).

December 1976

Section of International Law completed its study of the Protocol and SCP and submitted a recommendation and report to the House of Delegates in support of ratification of the Protocol and approval of the SCP.

January 1977

Section of Insurance, Negligence and Compensation Law submitted a recommendation and report to the House of Delegates again in opposition to ratification of the Protocol and approval of the SCP.

January 1977

Standing Committee on Aeronautical Law approved the recommendation of its special subcommittee favoring ratification of the Protocol and approval of the SCP, and issued notice of support for the recommendation of the Section of International Law and opposition to the recommendation of the Section of Insurance, Negligence and Compensation Law.

February 1977

The American Bar Association's 380 member policy-making House of Delegates, by voice vote, rejected the recommendation of the Section of Insurance, Negligence and Compensation Law. Subsequently, by a standing vote of 209-81, the House approved the recommendation of the Section of International Law, favoring ratification of the Protocol and approval of the SCP.

[Exhibit B]

AMERICAN BAR ASSOCIATION SECTION OF INTERNATIONAL LAW

RECOMMENDATION

The Section of International Law recommends that the House of Delegates disapprove the resolution proposed by the Section of Insurance, Negligence and Compensation Law (which would disapprove the Guatemala Protocol [1] to the Warsaw Con-

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[1] The new system updating the Warsaw Convention for which advice and consent is being requested is basically set forth in the Guatemala Protocol which was adopted at Guatemala City in 1971. More recently the Guatemala Protocol itself was amended by Additional Protocol No. 3 adopted in Montreal in 1975, and the latter is the specific instrument to be considered for ratification. Protocol No. 3 differs only in two respects with the Guatemala Protocol. It replaces the gold franc used to express the limitation on carrier liability with the Special Drawing Right (SDR) and it removes the percentage requirement from the Final Clauses so that Protocol No. 3 can now come into effect when ratified by any thirty member states, regardless of their percentage of total international scheduled air traffic. Only the adoption of Special Drawing

Footnote continued on next page—

vention and the related Supplemental Compensation Plan) and adoption of the following resolutions:

Be it resolved, That the American Bar Association hereby approves the modification of the present system of compensation for airline passengers or their estates for death or personal injury occurring in international air tansportation which would result if the Senate gives its advice and consent to the Additional (Montreal) Protocol No. 3 of 1975 Amending the Warsaw Convention of 1929 as amended by The Hague Protocol of 1955 and the Guatemala Protocol of 1971;

Be it further resolved, That the American Bar Association recommends that the Civil Aeronautics Board approve the Supplemental Compensation Plan which would be an integral part of the program contemplated by Additional (Montreal) Protocol No. 3 as it would apply in this country.

REPORT

I. INTRODUCTION

The Warsaw Convention is the most widely adopted private law treaty in history. Among other things, by promoting worldwide uniformity of rules, the treaty is intended to make it easier for a passenger or the next of kin to recover from an airline should he be killed or injured in an accident. The treaty also limits the liability of airlines to these passengers. But, the Convention puts the burden on the airline to prove that it took all necessary measures to avoid the damage or injury; otherwise the presumption of airline fault controls. The Warsaw Convention originated in 1929 during the infancy of aviation, and it has carried forward to this day, although more recently subject to considerable—and valid—concern on the part of the United States as to the limits of liability.

Accordingly, in 1965 the United States served notice of denunciation because of the unreasonably low limit ($8,300) then in effect. The United States took the leadership, however, in forging the terms of an interim agreement known as the Montreal Agreement, which made air carriers liable without fault up to $75,000, and thus paved the way for recision of the notice of denunciation before it became effective.

The pending Guatemala Protocol and Supplemental Compensation Plan is the latest in a series of steps sought by the United States Government to ensure that U.S. citizens traveling on international flights are afforded an accident regime whereby recovery for damages will be "swift, sure, and sufficient."

The Protocol and Plan are designed to constitute an advancement in the field of compensation for the victims of air carrier accidents. The Guatemala Protocol makes those air carriers which are subject to it liable in case of air disasters without regard to fault. It limits air carrier liability to approximately $120,000 (100,000 special drawing right units); it provides for eventual increases in the limit which would add approximately $30,000; and it includes a "settlement inducement clause" designed to assure speedy recovery by exposing a carrier to payment of costs (including attorneys' fees) over and above the limit if an offer of settlement equal in amount to the ultimate award is not made within six months after a claim is filed.

The Supplemental Compensation Plan [2] provides for additional recovery up to $200,000 bringing the aggregate possible recovery to $320,000 once the Protocol and Plan are in force. In addition, the Agreement provides for unlimited payment of hospital and medical benefits as they come due. Based on compilation of recoveries from 1960 through the first six months of 1974, a $300,000 recovery is more than 84 percent of the recoveries for death under the domestic regime where there is no limit. And even aside from the unlimited medical payment aspect of the Agreement, a $300,000 recovery is more than 91 percent of the recoveries in injury cases during that period.[3] The Plan is to be funded by an initial charge of $2.00 on international tickets sold in the United States. Under the Agreement establishing the Supplemental Plan, that charge can be reduced to as low as 50 cents, depending on experience.

Under the terms of the Agreement, the contractor (The Prudential Insurance Company of America) is obligated to make a payment "not more than sixty (60) days after its receipt of proof of its obligation to make such payments." In accordance with the Agreement the contractor will pay unlimited hospital and medical benefits

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Rights has a bearing on the Supplemental Compensation Plan discussed herein. For simplicity's sake, reference in this Report will be to the Guatemala Protocol unless context requires otherwise.

[2] The Supplemental Compensation Plan is an integral part of the proposed U.S. ratification of the Guatemala Protocol.

[3] Civil Aeronautics Board: Levels of Recoveries on Account of Passenger Deaths and Serious Injuries in Airplane Accidents—1974 Study (dated January 1, 1975).

as they become due. Together, the Guatemala Protocol and Supplemental Plan comprise the system which the Insurance, Negligence and Compensation Law (INCL) section would have the ABA condemn.

It should be noted at the outset that an attack on the Protocol is in effect an attack on the entire Warsaw regime, including the Convention itself, since any argument which can be raised against the Protocol's $120,000 limit is even more pertinent to the existing limit. The United States Government early concluded that if the Convention were to be preserved, its limits would have to be increased to a reasonable level; absent such an increase, as is contemplated by the Protocol and Plan, the U.S. has already served notice it would withdraw.

It is apparent from the brief foregoing description—amplified in detail below—that the new system is designed to make recovery swift, sure, and—in that it establishes limits high enough to cover most American citizens—sufficient.[4] Although the new system recognizes that some cases still will be litigated, it is structured to minimize the number of cases going to trial and to simplify those that are tried by removing the time consuming and expensive requirement of proving fault when the presumption fails. Indeed, since there would be no defenses save the limited one of contributory negligence, there would not even be a trial as to whether the accident was caused by act of God, hijacking, riot, insurrection, sabotage, or any of a number of other circumstances over which the carrier has no control but which, under normal conditions, would be pleadable in defense of the carrier's liability. Rather, if a case must go to trial, an expeditious one-day hearing on the question of damages would replace the present drawn-out litigation over fault that regularly goes on for years.

We shall herein discuss first the value of the Warsaw Convention as an international treaty, second the value of the Protocol and Plan in cases of injury or death to passengers in international air transportation, and third, brief responses to the conclusory "reasons" advanced by the INCL report for disapproval of the Protocol and Plan.

II. THE WARSAW CONVENTION IS WORTH SAVING

The Warsaw Convention was concluded in 1929 and adhered to by the United States in 1934. It has been adopted or adhered to by over 100 nations—developed and underdeveloped; on both sides of the Iron Curtain; old world, new world, and third world. The Warsaw Convention has been cited by such groups as the World Peace Through Rule of Law movement as the most widely adopted private law treaty in the history of mankind, and a model of international cooperation.

The formal title—Convention for the Unification of Certain Rules Relating to International Transportation by Air—indicates that the treaty was in fact drawn up to promote world-wide uniformity of rules, particularly with regard to liability and documentation, relating to the international transportation of persons, baggage, or goods, performed by aircraft for hire. By establishing uniform rules as to rights and obligations between air carriers and users of international air transportation, the Warsaw Convention eliminates many conflict-of-law questions which would otherwise confront passengers, shippers and airlines. [See 9 Whiteman, Digest of International Law 523 (1968)]. In addition, it shifts the burden of proof as to negligence to the carrier; moreover, under the Protocol carriers would be subjected to absolute liability. The importance to injured passengers of the presumption of liability created by the Warsaw Convention and, by the same token, the importance to injured passengers of the proposed absolute liability under the Protocol and Plan can scarcely be overemphasized. The burden of establishing negligence by a preponderence of the evidence is, in most instances, exceedingly difficult and frequently impossible. Abandonment of the Warsaw regime then would result in erection of sometimes insuperable impediments to recovery by many, so that a few could have a chance at exceptionally large recoveries. The policy problems for the U.S. have been limited strictly to the sufficiency of recovery and, indeed, the proposed Protocol and Plan are designed to ensure sufficiency of recovery in the vast majority of cases.

Unlike many treaties and agreements, the Warsaw Convention did not fall victim to World War II, nor has it succumbed to the Cold War. Apart from its value in standardizing liability regimes as different as those in the Soviet Union, China and the United States, and serving as the impetus for the development of uniform travel documents such as the single interline ticket from New York or Zurich to the Fiji

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[4] Additional coverage is readily available for purchase by the individual whose personal situation might dictate the need for coverage in excess of these already significant amounts. Indeed, such individuals would most likely maintain substantial accident insurance policies in any event.

Islands or Keene, New Hampshire, U.S. adherence to the Warsaw Convention has enhanced this country's bargaining position in negotiating other important aviation agreements—e.g., hijacking and sabotage agreements.

The accomplishments and the value of Warsaw have been recognized by the legislative, judicial, executive department and regulatory agency levels.

The considerations supporting continued adherence to the Warsaw regime are even more telling in light of the improvements introduced by the Protocol and Plan than they were at the time of U.S. Adherence to the Warsaw Convention in 1934. As Secretary of State Hull then pointed out to President Roosevelt, Senate Doc., Executive G, 73d Cong., 2d Sess., p. 3: "It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges." [Quoted in *Ross* v. *Pan American Airways, Inc.*, 85 N.E. 2d 880, 885-86 (N.Y. Ct. App. 1949)]

But the most important benefit stressed by Secretary Hull was the presumption of liability on the mere happening of an accident. [*Ibid.*] As pointed out in *Pierre* v. *Eastern Airlines, Inc.*, [152 F. Supp. 486 (D.N.J. 1957)]: "A reasonable quid pro quo [for the liability limitation] is provided in the alteration of the necessary for proof of negligence as it existed before the acceptance of the Warsaw Convention. The difficulty of such proof in a great many cases is easily apparent."

Although as noted above, the U.S. served notice of denunciation in 1965, U.S. leadership resulted in the Montreal Agreement and the salvation of the Warsaw regime. The order of the Civil Aeronautics Board in approving the Montreal Agreement expressed the Board's recognition of the important role of the Warsaw Convention: "The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation."[5]

And among reasons for approving the Agreement, the Board found: " . . . The agreement will result in a salutory increase in the protection given to passengers from the increased liability amounts and the waiver of defenses under Article 20(1) of the Convention or Protocol. The United States Government has concluded that such arrangement warrant withdrawal of the Notice of Denunciation of the Warsaw Convention. Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States. . . ."[6]

The efforts of the U.S. executive departments to find a way to remain within the system—efforts that have continued from 1965 to the present—attest to the importance they attach to the Convention.

One concern of the contracting states when the Convention was adopted in 1929, and in 1934, the year of U.S. adherence, was to permit an infant industry to develop—which it could not be expected to do if faced with the prospect of catastrophic losses. In view of the current financial plight of international carriers of all flags, and the enormous carrying capacity of the Boeing 747s and other wide body aircraft, such considerations may still be relevant, notwithstanding the great progress international aviation has made.

While catastrophic risks are ever present and cannot be ignored, the emphasis of the Diplomatic Conference at Guatemala City was on devising a system of recompense that would be fair for all parties, but with primary emphasis on improving the position of claimants by making recovery swift, sure and sufficient.

It has been suggested by those challenging the Warsaw regime, including the package of the Guatemala Protocol and the companion Supplemental Compensation Plan, that the U.S. would be better off without Warsaw. This we believe is a shortsighted view of the Warsaw Convention. It has had, as noted above, the advantage of ensuring uniformity of basic liability rules throughout the world.[7] It has, despite

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[5] CAB Order E-23680 (May 13, 1966), p. 1.

[6] *Id.*at p. 3.

[7] If there is any doubt as to the value of the Convention's rules on liability, let it be remembered that, in the absense of such a treaty, some countries might impose liability limits far less compensatory than those criticized in the INCL Report. In a 1965 case involving the death of a Maryland resident in an airplane accident involving Varig Airlines in Brazil, the U.S. Court of Appeals for the District of Columbia held that a Brazilian law limiting liability to $170 controlled where the Warsaw Convention did not apply. [*Tramontana* v. *Varig Airlines*, 350 F.

Footnote continued on next page—

past problems of inadequacy of recovery, constituted a demonstration by the United States of its willingness to cooperate with the rest of the world in international aviation matters—at a time when many accuse the United States of "going its own way" in the international aviation community.

Of no little consequence, too, is the fact that under the Warsaw Convention there is internationally accepted uniform documentation and liability rules for cargo. Quite clearly this is substantial advantage[8] which would be lost through renunciation of Warsaw—renunciation which may be avoided through approval of the swift, sure and sufficient provisions of the Guatemala Protocol together with the Supplemental Compensation Plan.

It is the belief of this committee, based on repeated public pronouncements of our Government both at the Guatemala and Montreal negotiating tables and in subsequent reviews of the Protocol and Plan as a package, that in the event Additional (Montreal) Protocol No. 3 is rejected by the U.S. Senate, the U.S. will again—and finally—renounce the Warsaw Convention. The result will be:

1. It would trade a uniform international system of absolute liability for a system of assured protracted litigation;

2. It would trade a system whereby U.S. citizens making an international air trip, whether touching the United States or not, are assured of swift, sure, and sufficient recovery with no defenses save that of contributory negligence, for a system of expensive litigation and extended delay with the possibility of no recovery in the event of the air carrier's proving act of God, insurrection, sabotage, or the like;

3. Of international importance, the U.S. would be renouncing the world's most widely accepted private law treaty, on which the United States has been working over the past 15 years and through four administrations in an attempt to reach agreement internationally rather than simply go its own way and drop out of the Warsaw system.

III. THE GUATEMALA PROTOCOL AND THE SUPPLEMENTAL COMPENSATION PROGRAM ARE OF SUBSTANTIAL VALUE TO THE TRAVELING PUBLIC

A. No-fault supplemental benefits

The Guatemala Protocol and the Supplemental Compensation Plan ("the Plan") offer the traveling public very significant benefits, in most cases going well beyond benefits likely to be received under the tort system. They begin with the assurance that payments up to $200,000 above the limit imposed by the Protocol are available without proof of fault once it is shown that the carrier limit has been exhausted. Apart from the economic savings inherent in such a system, which we will discuss below, this assurance will be of great benefit to claimants at a time of considerable anxiety and maximum need. This is a consideration not to be minimized in evaluating the new system.

The Civil Aeronautics Board has recognized the virtues of a no-fault system for compensating victims of air crashes. This was done in approving the aforesaid Montreal Agreement which included the following among its provisions:

"(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

"Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which resulted in death, wounding, or other bodily injury of a passenger." Agreement CAB 18990.

In its order approving that agreement, the Board concluded that the provision dispensing with the requirement of proving fault (waiving defenses) met the public interest requirements of the Federal Aviation Act. CAB Order E-23680 (May 13, 1966), p. 3. The benefits available under the Supplemental Plan are significantly more substantial than those offered by the Montreal Agreement and, as indicated above, they are virtually automatic which means that considerable time and money will be saved as the amount of litigation is reduced.

2d 468 (1965), *cert. denied* 383 U.S. 943 (1966); see also *Armiges* v. *Real S.A. Transportes Aereos*, 377 F. 2d 943 (D.C. Cir. 1967)].

[8] It may be charged that uniformity of documentation (and liability rules) for cargo is a tail, wagging the dog of adequate compensation for passengers. We would suggest that the availability of the swift, sure, and sufficient compensation and unlimited medical payments to be provided by the Guatemala Protocol and the Supplemental Compensation Plan is clearly the major part of the package.

B. Level and speed of recovery under the supplemental plan

As previously noted, the Plan makes possible an overall recovery of up to approximately $320,000 by providing an additional $200,000 of provable damages from The Prudential Insurance Company of America ("Contractor") which will administer the Plan. Although the exact limit of carrier liability under the Protocol will vary slightly from time to time depending on the value of the U.S. dollar in relation to the SDR, the benefits available under the Plan are expressed in dollars and will remain constant unless the Plan's limit is revised. The maximum compensation available under the Plan alone is more than two and a half times the Montreal limit and the overall system limit is more than four times Montreal.

The overall limit also compares favorably with domestic recoveries where there is no limit. As shown in the Board's updated survey of recoveries[9] (1970 through the first six months of 1974), 84 percent of the non-Warsaw recoveries for death were less than $300,000 and 91 percent were less than $300,000 in injury cases. The survey has not yet been updated to reflect the elasped time between the date of the accident and the date of the settlement. (The word "settlement" includes recoveries as a result of litigation as well as agreed settlements.) But a good indication of the pace at which the tort system in the great bulk of aviation cases operates can be gleaned from the CAB "Settlement Survey" covering settlements with respect to accidents occurring in the period 1960 through 1963.[10]

In the recovery range of greatest concern for a review of the Protocol and Plan, between $100,000 and $300,000, only 61 percent of the claims were settled within four years and only 69 percent within five years. In the range between $300,000 and $500,000, only 15 percent of the claims had been settled within five years. In the $75,000 to $100,000 range, 20 percent of the claims remain unsettled after five years.

As indicated, the Settlement Survey also shows the average time required to settle in the respective recovery levels. It reveals that the average time required to reach settlement of claims above $100,000 was 4.2 years. The average time was 5.4 years for claims exceeding $200,000, 6.5 years for those over $300,000 and 3.6 years for those exceeding $500,000.

As noted above, most of the non-Warsaw recoveries through the first six months of 1974 have been below $300,000. This fact alone attests to the public interest in a system permitting an overall recovery of some $320,000 and the reasonableness of that level. But that is not all. The time required to receive the settlement must be factored in to assess the net benefit of the Guatemala system to claimants. Admittedly, in future cases it is possible that some claims may be settled earlier than reflected in the Board's Survey and that some will take longer. However, in cases where proof of fault is involved and where there is no time limit, there is little likelihood that many settlements will be made within six months as is likely to be the case under the new regime.

Article 22, 3.6(b) of the update Warsaw Convention[11] contains the so-called "settlement inducement clause" which was introduced to the treaty at the urging of the U.S. Government, to avert protracted litigation for those seeking recovery after an accident. It subjects carriers to costs (including attorney fees) over and above the Protocol limit if an offer equal in amount to the ultimate award is not made within six months after a claim is filed. In addition, Section 3.6(b) of the Agreement establishing the Supplemental Plan obligates the Contractor to make payments "not more than sixty (60) days after its receipt of proof of its obligation to make such payments." Thus in most cases under the new system settlements are likely to come within six months.

It is easy to see, therefore, that the claimant's net position will be improved significantly beyond the indicated dollar limits under the new system. This fact is illustrated by comparing the result of investing a settlement for a period equal to the difference between the average time required for settlements under the new system compared with the current tort system for non-Warsaw cases. Based on the settlement lags referred to above, this difference in time will be about four years on the average. Currently, investment in high-grade bonds yields approximately 8 percent annually. The investment of $320,000 at this rate produces a total capital and interest at the end of four years of over $430,000. The accretion itself is very meaningful and the fact that the recovery is under the claimant's control is most reassuring.

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[9] Levels of Recoveries on Account of Passenger Deaths and Serious Injuries in Airplane Accidents—1974 Study (dated January 1, 1975).

[10] Civil Aeronautics Board, Levels of Recoveries on Account of Passenger Deaths and Serious Injuries in Airplane Accidents (covering settlements with respect to aircraft accidents occurring in the calendar years 1960 through 1969). Tables III (A) and (B) for the period 1960-1963.

[11] Article VIII of the Guatemala Protocol.

Another factor to be considered in weighing the value of a no-fault system designed to maximize net recoveries for aviation accidents is that such a system should substantially reduce both the amount and complexity of litigation. Eliminating the risks of proving negligence when the presumption fails will also reduce the impact of contingency fees upon claimant recoveries. Contingency fees, of course, vary from time to time and place to place. One third is the figure often mentioned. Some may be higher and others may be lower. To illustrate the advantage to a claimant of a virtually automatic system where the lawyer may not be needed, if the fee is calculated at 30 percent, a $500,000 recovery is cut down to $350,000—just a little more than the limit of the new system. If the fee is more, of course, the claimant's take home recovery is further reduced. This, of course, does not factor in the value of the swift settlement assured by the Protocol and the Plan.

A system eliminating the waste associated with proving fault (leaving only contributory negligence as a defense), and permitting reasonable recoveries which are likely to be received by claimants within six months must be viewed as a major contribution to overcoming the short-comings of a tort system, the relevance of which has never been certain in aviation cases.

C. Unlimited medical and hospital benefits

Another aspect of the new system ignored by those objecting to the Protocol and Plan is the provision in the Agreement enacting the Supplemental Plan which affords unlimited payment by Prudential of hospital and medical benefits as they come due. The skyrocketing cost of hospital and medical care is common knowledge today and it probably has touched every member of the American Bar Association. The hospital and medical benefits provided by the Plan run to those who need them most, to passengers who are seriously injured and who require long, and in some case indefinite, hospitalization.

Claimant's attorneys have frequently singled out seriously injured survivors in arguing the inadequacies of Warsaw. Of course, no amount of money can ever compensate those individuals. But surely they deserve something better than to have bills for essential services mounting while the matter of who is responsible and the extent of the damages sustained comprise the centerpiece in the arena of litigation.

The conclusion is inescapable that a seriously injured survivor is better protected under a system whereby his hospital and medical bills are immediately reimbursed in full than he is as a recipient of a six-year-later, spectacular judgment which he must share first with inflation and then with attorneys and other specialists needed to obtain it.

Clearly, this feature must be counted as an important and civilized step forward.

D. Cost of supplemental benefits

When the anticipated frequency and level of claim payments under the Supplemental Plan are taken into account, it is apparent that the initial charge of $2.00 is a reasonable charge. Although it has been suggested by some claimant attorneys that it is excessive, none has given any valid reasons for such an assertion.

The charge must bear directly on experience. Since the Plan has had no experience of its own, it is necessary to calculate the initial charge on the basis of whatever experience in the airline industry is relevant and to make informed judgments as to how that experience relates to coverage under the Plan.

A review of the experience of the airline industry in recent years provides a basis for estimating that the frequency of claims for flights subject to the Plan will be about 1 in 80,000 passengers. A similar review of this experience indicates that the average size of claims which may be expected to be made against the Plan is in the range of $96,000 to $126,000. These amounts, however, do not take into consideration the fact that the very existence of the Plan and public awareness of the extent of the coverage which it provides may be expected to result in greater average amounts of claims. The requirement of the "Notice to Claimants" in the Agreement creating the Plan and the notice to passengers which will be included in airline tickets will ensure this public awareness. It is therefore, to be expected that the average claim will exceed the range described above and may reasonably be assumed to be in the neighborhood of $140,000. After allowing for expenses and taxes, the resulting charge required to pay this average claim is $1.88.

Another factor to be taken into consideration in establishing the initial charge is the requirement of building a positive balance in the Supplemental Compensation Fund. The Agreement provides for building this positive balance in order to cushion the impact of substantial claims and to dampen the degree of fluctuation in the level of the charge.

Considering all of these factors, it is reasonable to set the initial charge at $2.00. Of course, once the Plan is in operation, the charge will vary according to actual experience so that any excess or deficiency in the charge will automatically be adjusted. This automatic adjustment feature and the limited retention allowed the Contractor under the terms of the Agreement establishing the Plan are specifically designed to ensure that the charge is maintained at a reasonable level and that the maximum possible portion of charges collected is paid to claimants in the form of benefits. A plan providing the significant benefits discussed above, to be received speedily, with minimum resort to litigation and the expenses associated with it, must be counted as securing an important public benefit. When these facts are considered, it becomes apparent that an initial $2.00 charge with an automatic formula to adjust it to experience is a very reasonable initial charge.

IV. THE INCL "REASONS" ADVANCED FOR DISAPPROVAL OF THE PROTOCOL AND PLAN WILL NOT STAND SCRUTINY

A. Constitutionality

The INCL Report states that the Protocol and Plan "may" be unconstitutional. No reasons are cited. There is little likelihood of such a result. There is no decision of which the committee is aware declaring neither The Hague maritime, or the Warsaw aviation, limited liability concept unconstitutional, provided there is adequate notice and the like. While from time to time there have been vague allegations made to the effect that the Protocol and Plan somehow would deny due process of law, equal protection of the laws, or a constitutional right to travel, these arguments are neither convincing nor supportable.

Indeed, it is well established that the Warsaw Convention is in compliance with the Constitution of the United States, and the INCL Report does not explain how the Constitutional issues presented by the Protocol and Plan differ from those presented by the Convention. In the case of *Indemnity Insurance Co. of North America* v. *Pan American Airways* [58 F. Supp. 338, 339 (S.D.N.Y. 1944)], it was held that the Warsaw Convention did not violate the "Commerce Clause," and in *Pierre* v. *Eastern Airlines, Inc.*, [152 F. Supp. 486 (D.N.J. 1957)], the Court held that there was no conflict between the Convention's liability limitations and the right to trial by jury, referring in passing to similar holdings in admiralty cases and cases under the Longshoremen and Habor Workers Compensation Act and various workmen's compensation acts.

B. War chest

Because the liability limits of the Protocol would apply only to airlines (and their employees) and not manufacturers and governments, the INCL Report postulates the possibility that the prompt payments under the absolute liability provisions could establish a "litigation war chest" for the prosecution of "third party" litigation involving non-airline defendants. This "objection" is without merit (except that it does seem to recognize the desirability of limiting litigation, an objective which, however, the "War Chest" is supposed to defeat).

While there are good arguments that manufacturers should eventually be included in the Warsaw regime, the fact that the world's nations have not yet seen fit to take that step does not, in itself, increase the likelihood of third party litigation. Such a proposition would mean that the very fact of increased, speedier recovery under the Protocol and Plan would provoke increased litigation against manufacturers, an implication with which the American Bar Association should hardly identify itself.

The INCL Report in this respect presumes residual rights in a passenger to a recovery in excess of the maximum provided by the Protocol and Plan. But as seen earlier, there will be very few claimants who will not be fully compensated by the contemplated program. Indeed, the liberal provision for up to approximately $320,000 compensation for provable damages plus *unlimited medical benefits*, would make it unlikely in most cases that any passenger would have to sue anyone. Certainly it would shock the conscience to think that a plaintiff made whole under the Protocol and the Plan could once again recover against the Government and/or the manufacturer.

The INCL argument also proceeds on the basis that there is an automatic right of subrogation of the Contractor insurance company against third parties. But the provision of the Supplemental Agreement upon which INCL relies is not as automatic as implied, as it simply provides that the claimant shall agree with the Contractor that "insofar as permitted by law" the Contractor shall be subrogated, to the extent of its payment, to the claimant's right of recovery against any other party except the carrier, its servants or agents. In any event, a right to subrogation would not itself encourage the Contractor to litigate against third parties, and therefore not provide a vehicle for the claimant to engage in third party litigation, particularly in a regime which (as paragraph 7 of the INCL Report indicates) renders the issue of fault academic as to the airlines, thus complicating the opportunity to assess fault against the manufacturer and, at the same time, *fully* compensates most air disaster victims before thought of suing a manufacturer would even be conceived. And here again, the very few who might not be made whole by the Protocol and the Plan would think carefully about contributing to a "War Chest" where the risk of lack of success may be high, the expense of litigation and attorney's fees high, and the excess of possible recovery over the Protocol and Plan low. Under these circumstances, the committee believes the INCL "War Chest" argument to be merely a smoke screen.

C. CAB jurisdiction

There is no real basis for the assertion that the CAB does not have statutory authority to approve the Supplemental Compensation Plan. Aside from an apparent misreading of the purposes and authority of the CAB (it is the Federal Aviation Administration, not the CAB which is charged with the safe and efficient use of the airspace; the CAB, on the other hand, and among other things, is charged with regulating passenger fares and charges), the INCL argument seems to proceed on the simple basis that "The insurance industry has not and cannot be regulated by the Civil Aeronautics Board . . . ." But there is no attempt at CAB regulation of the insurance industry. The Supplemental Compensation Plan constitutes a *carrier agreement* establishing passenger charges relating to air transportation. Congress has required that such agreements be filed with the Board and has said that they must be approved unless they are found to be adverse to the public interest.

Without Board approval, the carriers, over whom the Board surely has jurisdiction, could not go forward with the agreement except at their (antitrust) peril. The same is not true of the Contractor, because no antitrust problem is presented by the Contractor's role under the Supplemental Agreement.

D. Uncertainty

The INCL Report contends that because of the alleged questions of constitutionality and CAB jurisdiction, and the problems of the supposed war chest, "the resolution of litigation arising out of aircraft accidents will present numerous legal uncertainties thereby making it difficult to predict results and to advise the respective parties to litigation." But the very core and accomplishment of the Protocol and Plan is a reduction in the disparity in liability rules and limits, and elimination of many of the doubts, delays and uncertainties now existing under the common law (which applies when the Warsaw limits are broken) and the differing world-wide limitations. The INCL Report argues that it would be difficult to predict the results of litigation because there are "a number of potentially vague and problematical provisions" in the new regime. But the new system is designed to give claimants reasonable recovery as soon as possible without the delay and cost of litigation, and there is very little that is vague or problematical about the system. It may be that vagueness and uncertainties are sought in the INCL Report in order to foster litigation.

E. Growth of the industry

It is true that the air transport industry is stronger than it was in 1929 when the Warsaw Convention was first formulated. But the publicity that contributes to the spectacular recoveries in air crash cases, the publicity which is attendant upon demonstrative attempts to prove fault against the airlines prior to an opportunity to assess damages, and the uncertainty of insurance capacity with today's new, larger aircraft, still create a situation making liability limitation desirable for both the airlines and the insurance industries and, therefore, for the public which those two industries serve. It is that public which must ultimately bear the burden of excessive and grandiose awards.

But this contention really misses the point anyway. The Guatemala Protocol is oriented toward the passenger—toward affording injured passengers swift, sure and sufficient recovery. It is in order to provide this relief that the new system initially would involve a charge of $2.00 per passenger which, however, may well go down unless experience prevents it. This is believed by those directly concerned to be an appropriate and reasonable charge for the benefits of the proposed new system, as explained earlier in this Report.

F. Comprehensiveness of recovery

INCL contends, in highly conclusory form, that current CAB statistics indicate that the proposed system "will continue" to deprive a substantial percentage of accident victims of reasonable compensation for the damages sustained. This charge, however, has been answered above in this Report, where it was indicated that the total limitation provided by the Protocol and Plan exceed 84 percent of the recoveries for death, and 91 percent of the recoveries in injury cases, in domestic cases where there is no limitation. Furthermore, the INCL Report ignores the overwhelming value of the unlimited medical benefits afforded under the Supplemental Plan.

G. Alleged benefits of the fault system

Finally, INCL argues that while "absolute liability" of airlines under the Guatemala Protocol would in fact provide a limited benefit, one of the consequences would be to "eliminate examination into the issues of fault and responsibility of air carriers" which, it is alleged, has always served the beneficial purpose of promoting safety in civil aviation.

Implications thus raised should be rejected out of hand by the American Bar Association. Safety in aviation is promoted primarily by the efforts of the airlines and the manufacturers, combined with the role of the Federal Aviation Administration, and the National Transportation Safety board which itself carefully and thoroughly investigates the very few accidents which do occur within United States jurisdiction and recommends corrective action to the FAA, the carriers and the aircraft manufacturers. It must be remembered, too, that airlines and manufacturers have an overwhelming self-interest in safety. If airlines do not operate safely, people will not fly them; and if manufacturers do not build a safe product, airlines will not buy them. The outstanding safety record of the United States and the world airline and manufacturing industries, operating with the aid of these governmental agencies alone disproves the need for any further "examination" through the costly, lengthy and, in this respect, questionable litigation process.

V. CONCLUSION

The comprehensive world-wide network of airline service, a hallmark of the modern age, requires concomitant regime establishing uniform rules of carrier liability with respect to persons, baggage and cargo. The Warsaw Convention, an almost universally subscribed treaty, has served that purpose since 1929, despite its publicized defects, e.g., inadequate limitation of liability. But the time has come to update Warsaw and some of the protocols to it (e.g., the Hague Protocol, never ratified by the U.S.) both in the interest of achieving greater uniformity and of making certain that the regime reflects present needs and values.

The Guatemala Protocol and the Supplemental Compensation Plan that goes with it meet both of these objectives. The new system will continue to guard air carriers against the uninsured, catastrophic loss such as might be sustained should two wide-bodied jets collide. However, the principal emphasis of the Guatemala system is on guaranteeing benefits at a reasonable level to claimants, benefits *not* assured by the tort system.

Thus, as a result of prodigious labors by U.S. government representatives, the new system establishing absolute liability up to an overall limit of approximately $320,000 with a provision to induce settlements without litigation within six months, fully meets the objectives of the Government for a treaty encompassing "sureness of recovery, speed of recovery and sufficiency of recovery." Coupled with the provision in the Supplemental Compensation Plan for unlimited medical and hospital payments, the new system is preferable in every way to the waste and duplication of costs associated with the tort system which, with few exceptions, functions at a snail's pace.

Apart from the new system itself, which we find virtuous, its importance as a bargaining tool in international aviation negotiations is very considerable. And there is positive value to the nation's foreign policy in remaining in a treaty believed by so many nations of varying ideologies to be necessary.

In short, the system initiated by the Guatemala Protocol and the Supplemental Compensation Plan established pursuant to it, mark a constructive advance. They deserve wide support, including endorsement by the American Bar Association.

* * * * * * *

Copies of this Report and Recommendation are being mailed in early November to the Standing Committee on Aeronautical Law and the Aviation Subcommittee of the Administrative Law Section, soliciting their views on the foregoing materials before the International Law Section's Council meeting in December. As the Report indicates, this matter first arose in our Section when a contrary resolution was proposed prior to the August 1976 Annual Meeting by the INCL Section. That Section is aware of this Report and Recommendation.

[Exhibit C]

AMERICAN BAR ASSOCIATION—STANDING COMMITTEE ON AERONAUTICAL LAW

REPORT

The topic which has received the largest share of the Committee's attention during the last six months is the question of U.S. ratification of the Guatemala Protocol to the Warsaw Convention. The Guatemala Protocol is an international agreement which would amend the Warsaw Convention limitation as to the amount of damage which may be recovered on account of injury or death incurred in the course of international air travel. A novel concept introduced by the Guatemala Protocol involves the creation of a supplementary compensation fund which would be financed through a surcharge imposed on the price of international tickets. Participation in this supplementary compensation scheme would be optional with each signatory country.

In light of the substantial interest which the Protocol Supplementary Compensation Plan has generated, the Standing Committee thought it would be instructive to assemble a panel to debate the Protocol's relative merit from various points of view.

A special committee chaired by Brigadier General Martin Menter, U.S.A.F. (Ret.) presented the program in conjunction with the Annual Meeting in Atlanta. The program included a keynote address by Mr. Robert P. Boyle, a former special consultant to the United States Government with respect to the negotiation of the Protocol. Additional speakers presented the viewpoints of the State Department, foreign governments, air transportation, the insurance industry and the private air crash bar.

At the same time the Standing Committee appointed a special committee, chaired by George U. Carneal to study the recommendation of the Section of Insurance, Negligence and Compensation Law that the Association adopt a resolution opposing Senate ratification of the Guatemala Protocol. During the pendency of the subcommittee's study, the International Law Section recommended that the ABA adopt a resolution urging confirmation of the Protocol. The subcommittee's study was accordingly broadened to a consideration of both of the competing recommendations.

In late December, 1976 the subcommittee filed its report with the Standing Committee recommending endorsement of the International Law Section's recommendation that the ABA endorse the Protocol and the supplementary compensation plan. In making its recommendation, the subcommittee's report explored the historical antecedents and terms of the agreement, and concurred in the International Law Section's conclusion that the Protocol and supplementary plan would serve the public interest and be of substantial benefit to the traveling public by providing "sureness, speed and sufficiency of recovery" in air carrier accidents involving international flights.

On January 3, 1976 the recommendation of the subcommittee was adopted by the Standing Committee which authorized its chairman, or his designee, to appear before the House of Delegates at its mid-year meeting to present the Committee's views.

In addition to its work with respect to the Guatemala Protocol, the Standing Committee is currently studying possible implementation by the FAA and the CAB of Administrative Conference recommendation 72-6. This recommendation concerns the procedures involved in the imposition of civil penalties by administrative agencies.

In addition to these specific activities, the Committee regularly reviews current Congressional, administrative and judicial actions affecting aviation. In the event that the Standing Committee's continuous monitoring of aviation related topics uncovers any subject with respect to which it feels that the ABA should take formal action, it will undertake at once to formally present the matter to the Association for its consideration.

Respectfully submitted,

HENRY C. THUMANN, *Chairman.*

Senator KASSEBAUM. Thank you, Mr. Gray. I have just a few questions before we go to the second panel. Unfortunately, we are operating under some time constraints because of a meeting scheduled for 11 o'clock.

SETTLEMENTS ABOVE $320,000

First, I would like to ask if there are any figures that either Mr. Konigsberg, Mr. Romans, or Mr. Gray might have on how many settlements have been made that have been above $320,000 as far as compensation.

Mr. **Konigsberg**. The latest figures that we have regarding the last mass disaster, which was a DC-10 crash at Chicago, was that the average figure was slightly above $400,000 paid.

Senator **Kassebaum**. Of that, what percentage were lawyer fees?

Mr. **Konigsberg**. Senator, what I am saying is that the cases were settled for $400,000. Are you asking what was the average fee?

Senator **Kassebaum**. Just percentagewise. What percentage of that figure went to legal fees?

Mr. **Konigsberg**. I do not know. I do not have that figure. I think it probably could be obtained.

Senator **Kassebaum**. I think it might be relevant to our trying to analyze just what the compensation might be.

[The material referred to follows:]

[As of date of publication, the information referred to had not been supplied.]

INCREASE PRICE OF TICKET

Senator **Kassebaum**. Mr. Konigsberg and others have mentioned the $2 charge for funding of coverage. It would seem to me that the airlines themselves in one way or another might just increase the price of the ticket. Obviously, they are going to have to increase the price of a ticket to protect themselves in some way for coverage.

Mr. **Konigsberg**. Not according to the aviation insurers. In other words, the aviation insurers say that the price of limited insurance and unlimited insurance virtually is the same. To the extent that you say the passengers are currently paying for the aviation insurance in their tickets even under domestic situations, that is true.

The number that we are given by the aviation insurance industry is somewhere between 50 and 85 cents per travel, per leg of travel. What the aviation insurers tell us is there would be virtually no impact on the price of a ticket if the airline went to unlimited liability insurance tomorrow.

Mr. **Romans**. Madam Chairman, that is not my view. I think that Mr. Ferguson of the Prudential, who will be testifying this morning will present a clear answer to your question. But in response to Mr. Konigsberg's statement, I believe that other insurance companies in addition to the Prudential have said that the cost of premiums will go up. They just dispute the amount of the increase.

I think, as will be testified to later, the contract that the Prudential has requires a very high percentage of the amount paid to go back to passengers as benefits, and if the Prudential is wrong, if the $2 surcharge is too high, then the excess will not go to the Prudential, but rather it will go to the passengers' fund. As the fund builds up either the surcharge will go down or the contract will be modified to increase the limit of liability. But that money will go to passengers.

NO JURISDICTION FOR SETTLEMENT

Senator **Kassebaum**. Mr. Konigsberg, how do you answer the issue raised by Mr. Gray of, in the case of jurisdiction and those accidents which would occur where there would be then, without the protocol, no jurisdiction for settlement?

Mr. **Konigsberg**. The answer is there may be relatively few airlines who do not do business in the United States, that otherwise would not be subject to jurisdiction. The subject of jurisdiction is one of the limitations or features of the common law system that we all deal with.

Currently today there may be accidents involving people over whom jurisdiction cannot somehow be obtained. That is one of the things with which trial lawyers have to live. I think, though, on balance the number of situations is very small in comparison to the magnitude of the benefits to the passengers that have been taken away, that would be taken away by this.

Senator **Kassebaum**. When you say you do not believe that there is any benefit to the passenger from ratification of the protocols, would you not concede that a speedy settlement, however, which can be obtained by the protocol would not be of some benefit, obviously, to certain passenger or families?

Mr. **Konigsberg**. With regard to speedy settlements, the experience that we have had is that the speed of settlements have increased even under the domestic situation, but that whatever delays are responsible for a delay in payment, they are almost never the delays of the passengers or the passengers' attorneys. Neither the passenger nor the passenger's attorney has any financial interest in the delay of a settlement.

The passengers cannot make the airlines and the insurers pay the money. The speed of the settlement is in large part controlled by the people who have the money. One of the reasons that settlements are not forthcoming is the lack of interest paid or the relatively small amount of interest to which these judgments are subject.

The treaty's provisions really do not deal very well with that issue. I do not think our experience can demonstrate at this point that the protocols, if adopted, would prompt speedy settlements. But certainly the plaintiffs and the plaintiffs' bar and the passengers would certainly be in favor of speedy settlements, could that be achieved.

Senator **Kassebaum**. I do not think, though, that I would lay the blame at the door of lack of interest.

Mr. **Konigsberg**. It certainly would not be lack of interest.

Senator **Kassebaum**. Thank you all very much. I appreciate the testimony of all members of the panel. And, a special thanks goes to Senator Clifford Case for visiting us today.

It is a pleasure to welcome Senator Helms to the panel this morning. Senator, you just missed a very interesting discussion, and we are glad to have you here.

Let me now welcome our second panel: Mr. Ferguson, Mr. Landry, and Mr. Hitchcock. Why do we not start in the middle again. Mr. Landry?

STATEMENT OF JAMES E. LANDRY, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, AIR TRANSPORT ASSOCIATION OF AMERICA, WASHINGTON, D.C.

Mr. LANDRY. Thank you, Madam Chairman.

Madam Chairman, Senator Helms: My name is James E. Landry. I am senior vice president and general counsel of the Air Transport Association of America. I have submitted a prepared statement for the record which I hope the committee will consider in its deliberations.

I speak to you today on behalf of nearly all the scheduled airlines of this country. We believe that the protocols before you, the Montreal protocols 3 and 4, should receive your advice and consent. We submit that they represent a very considerable advancement in the method of compensating victims of aircraft accidents.

International aviation obviously requires agreements and treaties among nations. Among them is the Warsaw convention, the most widely subscribed private law treaty in the history of the world. That treaty, in conjunction with the Montreal agreement of 1966, provides a uniform legal regime and protects international travelers and shippers from the uncertain entitlements established by local law and the extremely low limits on recovery permitted in many nations. The treaty has been in effect for more than 50 years.

The United States is the leading aviation nation of the world and exercises enormous influence in international aviation matters. Thus it assumed the leadership in updating the Warsaw convention, in particular to address the current needs of American citizens. In doing so, the United States insisted that a revised treaty must make recovery by Americans certain, speedy and sufficient.

With these objectives in mind, the United States insisted upon a protocol that would permit recovery against airlines up to approximately $125,000, which is 100,000 special drawing rights; a settlement inducement clause that would force airlines to make prompt and adequate settlements within 6 months; and the right to operate in a nation's own territory a supplemental compensation plan for one's own citizens.

The United States also took the lead in stimulating and guiding the development of an actual supplemental compensation plan to be operated within U.S. territory. In doing so, it weighed the relative merits of a privately operated supplemental plan or one run by the Government itself, opting for the former.

In addition to specifying that the additional level of recovery be $200,000 in provable damages, bringing the initial overall ceiling to $325,000, the Government insisted that the charge at the outset not exceed $2, and that at least 90 percent of the proceeds be available for payout by the plan.

The Prudential Insurance Co. of America has agreed to administer the plan and has accepted the aforesaid guidelines. In addition, Prudential has agreed to pay all hospital and medical bills, without limitation, as they become due.

The added compensation under the supplemental plan will be $200,000 and the charge $2 at the outset. Thereafter the charge will be a function of experience, and there is good reason to believe that the charge will be reduced, or the limit increased or both, if aviation safety follows the pattern of the past 2 years, which have been accident-free.

The new system offers significant improvements over both the Warsaw Convention itself and the tort system applicable domestically. Among the improvements offered by the new system are the following:

It guarantees recovery to a claimant without arguing fault;

It expands the existing limit four and a half times to an overall limit of approximately $325,000, plus unlimited hospital and medical benefits;

It virtually guarantees recovery within 6 to 8 months, as compared with 2 to 6 years under the tort system or in cases where willful misconduct is alleged under the Warsaw Convention;

It eliminates the need for high priced aeronautical litigation specialists, thus increasing a claimant's net recovery, which no longer has to be shared to pay the 25 to 40 percent contingency fees applicable where fault or willful misconduct is an issue.

On the other hand, the opportunity to make these improvements will be lost forever if advice and consent is withheld. It is important in this connection to consider the consequences of withholding ratification. The United States, having led many nations to accept the protocols, will be seen as unable to implement its own agreement. This will mark an end to the longstanding U.S. hope for a modernized, equitable, uniform and universal liability regime for international aviation.

There will also be reluctance on the part of other nations to whom this treaty is of great importance and who stand ready to ratify it, to follow the U.S. lead in connection with other important aviation matters.

By way of conclusion, let me repeat:

Protocols 3 and 4 make changes in the Warsaw Convention that are long overdue, both in the liability system itself and the documentation requirements. That will mean significant increased liability limits, certainty and speed of recovery, and the extra benefits provided by the supplemental compensation plan, including an additional $200,000 in recoverable damages and provision for unlimited hospital and medical benefits to be paid as bills come due. These improvements represent a major advance in compensating victims in international air crashes, to the benefit of claimants, airlines and the public generally.

This regime, the handiwork of the U.S. Government, will permit the United States to continue its participation in an almost universally subscribed treaty which, in turn, will be beneficial in its relations with other nations on other important aviation matters. Action by the United States on these protocols has been too long delayed. The protocols merit immediate implementation. If they are not ratified, the credibility of the United States will be called into question and its continuing leadership role in the world aviation community will be jeopardized.

Madam Chairman, there has been a great deal of discussion about the level of contingency fees and so forth, with the plaintiffs' bar in the previous panel. I know Mr. Konigsberg said the American Airlines DC-10 crash required very little work by lawyers—indeed that the fault was known and therefore very little work was involved.

I should say that that particular crash reflects very well the problems with the current tort system in aviation crashes, because the shocking impact of contingency fee agreements in aviation accident litigation so outraged the Federal judge handling the cases arising from the 1979 American Airlines DC-10 tragedy that in March of this year he temporarily embargoed payments of damages until the court was satisfied that the attorneys' portion of the award was not excessive.

The cause of the judge's outrage? One case in which two attorneys, apparently receiving $10,000 to $15,000 per hour for their labors, collected $383,244 in fees, $13,000 less than the widow and $26,000 more than the deceased's two infant children.

A second case, in which the lawyer received a $172,000 fee for negotiating a $550,000 settlement, leaving $278,000 for the widow and $33,000 for each of three children, ranging in age from 12 to 15.

A third case, in which the lawyer received $83,333 for negotiating a $250,000 settlement, of which the widow received $129,167 and each of three children, ranging from 19 to 24, received $12,500.

And a fourth case, in which the law firm received a $94,434 fee for negotiating a $450,000 settlement, with the widow receiving $240,000 and her two children, 14 and 18, each receiving $55,000.

The judge, one of two senior Federal judges handling the consolidated litigation in Chicago, described what he was seeing in such terms as, and I quote, "a good shafting," "gouging," "excessive," and "seriously out of line." Such strong language should become a thing of the past in the Montreal protocol-supplemental compensation plan regime of the future, in which general practitioners, rather than high-priced specialist, should suffice for aggrieved parties seeking equitable, swift, and certain recoveries.

On behalf of our airline members, we urge that the Senate give its advice and consent to ratification of the Montreal protocols. Thank you, Madam Chairman.

[Mr. Landry's prepared statement follows:]

Prepared Statement of James E. Landry[1]

UPDATING THE LIABILITY AND DOCUMENTATION PROVISIONS OF THE WARSAW CONVENTION

Mr. Chairman and Members of the Committee. My name is James E. Landry. I am Senior Vice President and General Counsel of the Air Transport Association of America, and I speak to you today on behalf of nearly all the scheduled airlines of this country.

Our member carriers appreciate this opportunity to review the history of the Warsaw Convention and to discuss the Protocols amending it for which your advice and consent is requested. The airlines believe that these instruments represent a highly desirable updating of the liability and documentation provisions of the Warsaw Convention and are a considerable advancement in the method of compensating victims of aircraft accidents.

I submit that these Protocols will serve both the domestic and international interests of the United States. The airlines therefore urge the Senate to give its advice and consent to ratification of Protocols 3 and 4, so that these long-awaited improvements to the Warsaw regime may come into force at an early date.

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[1] See Appendix, page 82, for attachments to Mr. Landry's statement.

BACKGROUND

Since 1934, the United States has been an adherent to the Warsaw Convention. That treaty, subscribed to by over 100 nations of the world, currently creates a presumption of airline liability in death and personal injury cases, and imposes a limit on recovery of approximately $10,000. By the terms of the Convention an airline will not be held liable if it proves that it took all necessary measures to prevent the accident, or that it was impossible to take such measures. Conversely, a claimant may exceed the limit by proving willful misconduct on the part of the airline.

The Convention has been criticized in many quarters, including the United States. Nevertheless, it has provided a uniform legal regime which protects international air travelers and shippers from the uncertain entitlements established by local laws and the extremely low limits on recovery permitted in many nations of the world. Moreover, it has functioned for half a century as a useful catalyst, bringing aeronautical authorities closer together in disputes over other important aspects of international aviation.

When the Convention was structured in the late 1920s, the concern of those who drafted it was to develop a treaty which could be accepted by nations with diverse economies and differing levels of involvement in aviation, which would be fair to passengers and shippers, and which would permit a new, struggling industry to develop. At the time it came into force in 1929, it met all of those objectives. Passengers and shippers were aided in determining their rights against carriers, and were permitted what then seemed to be reasonable recoveries in death and personal injury cases or when baggage and cargo was damaged or lost. For their part, carriers were better able to control insurance costs which were formidable and, more importantly, were shielded against the possibility of being wiped out by a catastrophic accident.

By the 1960's it was generally conceded in the United States that the Warsaw limitation on death and personal injury—$8,300 at that time—had not kept pace with affluence or inflation. Moreover, dissatisfaction with the low limit no doubt was a major factor in moving claimants' attorneys to imaginative advocacy, to allegations of willful misconduct as a means of getting a higher recovery. Some of their efforts were successful, others were not. More often than not, both the claimants and the airlines were losers in those cases—claimants because trials in which willful misconduct was in issue were time consuming and expensive; the airlines, because prolonged litigation was expensive for them too and because, as a practical matter, one of the advantages of the Convention, knowing the extent of exposure, had been essentially nullified. Although awards in excees of the limits were infrequent, airline insurance coverage had to take into account allegations of willful misconduct with the possibility of unlimited recovery.

Beginning in the 1960s the United States Government was faced with a serious dilemma. It was aware of the importance of continued adherence to a treaty, useful in its own right, that was deemed essential by so many nations with which the United States must deal on other vital aviation matters. It was clear that the United States could not justify to its own citizens the low limits of the Convention. Nor could it persuade other nations to accede to limits that would be wholly satisfactory for American citizens, but would be more than their own citizens could expect to recover and excessively expensive for their flag carriers.

When efforts to sell other nations of the world on large quantum increases in the limit proved unavailing, the United States made it known that it would reconsider its action if a reasonably satisfactory interim arrangement could be made before the denunciation became effective six months later. Denunciation was rescinded just two days before it would have become effective when most of the airlines serving the United States entered into an agreement to waive the defenses available under the Convention and agreed not to invoke the limitation on liability up to $75,000. This agreement, known as the Montreal Agreement, was approved by the Civil Aeronautics Board ("CAB") on May 13, 1966 (Order E-23680).

In rescinding its denunciation, the United States Government stressed the fact that it considered the Montreal Agreement as to interim measure not to be regarded as a substitute for a revised treaty. The United States then assumed the primary role in designing a new regime embodying the no/fault concept it had insisted upon in the Montreal Agreement. Throughout the negotiations leading to Montreal Protocol 3, the United States Government has recognized the need to protect carriers from the possibility of the catastrophic loss, but its principal emphasis has been to secure improved benefits for claimants and the travelling and shipping public. It has consistently insisted upon, and it has now obtained, a convention under which recovery will be assured and swift with a limit high enough to permit a significant recovery for everyone and full recovery for most Americans. Thus the instruments before the Senate are largely of U.S. design with the interest of U.S. citizens a foremost consideration.

Essentially, Montreal Protocol 3, which was opened for signature on September 25, 1975, is the same as the Protocol adopted a few years earlier at a Diplomatic Conference held in Guatemala City, changing only the monetary units used to express the limitation on recovery. The Guatemala protocol, like the Warsaw Convention, expressed the limits in French gold francs of specified metallic properties, the so-called "Poincare Franc". Montreal Protocols 3 and 4 utilize the Special Drawing Right of the International Monetary Fund ("SDR").

The SDR is an averaging of the currencies of five members of the IMF. In terms of U.S. dollar value the 100,000 SDR limit contained in the passenger regime has fluctuated over a fairly narrow range over the past few years. For present purposes, $125,000 U.S. is a reasonable median figure.

The advice and consent of the Senate to ratification of Montreal Protocol 3 (passenger and baggage) and Montreal Protocol 4 (cargo and mail) was originally requested by President Ford in January 1977. Strictly speaking, those are the only instruments before this Committee. However, the Executive Department, in order to secure a package that it regards as adequate for American citizens, has made it clear, beginning with its negotiations in Guatemela and subsequently by specific reference in president Ford's letter transmitting the Protocols to the Senate, testimony before this Committee in 1977, that a satisfactory supplemental compensation plan is a necessary companion to Protocol 3. A supplementary compensation system is expressly recognized in Montreal Protocol 3 and a comprehensive plan to supplement recoveries taking the form of a carrier agreement was devised by the airlines serving the United States under the supervision and guidance of the U.S. Government representatives. The carrier agreement establishing that plan was approved by the Civil Aeronautics Board [1] (Order 77-7-85, July 20, 1977). I am attaching a copy of that Agreement (Attachment "A") for the Committee's reference.

I shall first discuss Montreal Protocol 3 and the Supplemental Compensation Plan—that is, the passenger regime—and then highlight Protocol 4 dealing with cargo and mail.

PROTOCOL 3

The principal features of Protocol 3 are: absolute liability; an unbreakable limit of 100,000 SDR's (approximately $125,000); a settlement inducement clause; a virtual guarantee to American citizens of access to American courts in the case of accidents occurring outside the United States; and express recognition of the right of each party to the treaty to establish a supplemental compensation plan within its own territories.

Absolute liability—certainty of recovery

By making airlines absolutely liable in death and injury cases Protocol 3 takes a major step in behalf of consumers of air transportation, beyond the rebuttable presumption set forth in the Warsaw Convention. Except in cases where contributory negligence is involved, it guarantees recovery against the airline leaving for proof only the extent of damage. This means that dependents will recover if the family breadwinner is killed or injured regardless of how hard the airline tried to avoid the accident—even if the crash were caused by a bolt of lightning or other act of God—was incident to a hijacking—was a direct result of sabotage—is counted as a casualty of war—or attributed to an act of a public enemy, for instance, the bringing down of an aircraft with a heat-seeking missile in the hands of an extremist group or a deranged person.

There are many advantages to this absolute liability system over the conventional tort liability system applicable to domestic accidents. Not the least of them is the peace of mind to the claimant of being freed from having to relive his agony or bereavement in a long drawn out effort attempting to prove fault with no certainty of success.

It also is a far less expensive way of compensating victims. In aviation cases this is true whether viewed from the perspective of the claimant, the airline or the public. If there is a loser in any no-fault system, it is the expensive legal specialist skilled in such things as conflicts of laws and proof of negligence in aircraft accident cases, since only the family lawyer will be needed to establish the extent of damages. Indeed, the local attorney in general practice will be quite capable of giving advice and handling the entire matter under the proposed new regime.

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[1] A Petition for Reconsideration was filed by ACAP in 1977.

In addition to the savings that will be realized by claimants and the airlines, removing fault from airline accident cases will help relieve the crowded court calendars and help reduce the costs of maintaining the court system. A suit limited to proving damages should be completed expeditiously instead of going on for years and years as many now do. In fact, it would be surprising if such a trial would extend beyond a single day. As a matter of fact with such things as the permutations of negligence out of the way it is unlikely that very many cases will even go to trial. And, because of the settlement inducement clause of the Protocol and the contractual obligation to dispose of claims quickly under the Supplemental Plan, which I shall discuss presently, it is even doubtful that very many suits will be filed.

There is, I submit, yet another benefit to be derived from the absolute liability regime. It will eliminate from accident investigations subjective tort liability considerations and thereby enhance the proceedings of special accident investigating commissions and boards which have been established in most aviation countries to conduct inquiries into aviation crashes and issue determinations of "probable cause". In the United States, the National Transportation Safety Board was created by Congress for this purpose.

These boards of inquiry are staffed by individuals whose systematic training and experience qualify them to make the judgments and reach the conclusions that go into a determination of "probable cause" for the sole purpose of recommending corrective measures in the hope of avoiding future accidents. Annex 13 to the Convention on International Civil Aviation sets forth international standards and recommended practices governing accident inquiry and reporting.

It is important that everyone cooperate fully in accident investigations so that all facts shedding light on the accident may be adduced. To be most helpful, all participants should be free to "speak from the heart and not from the mind." But, when a pilot or mechanic or an airline executive appears before NTSB, he must be ever mindful that claimant attorneys are in attendance, taking notes, and preparing a suit for money damages which will be decided by the jury. At the very least, a system that makes liability and compensation depend on fault introduces a negative, if imponderable, element into safety board proceedings. And it seems incongruous to have expert boards of inquiry, and procedures designed to encourage full cooperation in the hope of preventing future accidents, and yet to base compensation for victims on fault, and utilize a panel of laymen free to reach a different conclusion as to the cause of an accident. Protocol 3 will eliminate the need for the second go-around.

Sufficiency and speed of recovery

As I have said Protocol 3 establishes an unbreakable limit of $125,000. This is a far cry from the $8,300 limit of the Warsaw Convention which the United States found unacceptable for its citizens. It is also a significant increase over the limits of the Montreal Agreement. It is considerably higher than need be in the view of many nations of that world, including some of the Western European nations. Indeed it is more than a substantial number of American claimants will be able to prove. Furthermore, when it is remembered that no legal steps are necessary to establish carrier liability, $125,000 becomes more attractive to a greater number of American citizens. But that is not the limit we should be focusing on in this hearing.

In keeping with the Protocol's recognition of the right of the parties to it to supplement the limit within their own territories, a principle for which the U.S. delegation fought long and hard at Guatemala City, the Executive Branch of the United States Government has insisted that an arrangement be made to increase the permissible recovery by an additional $200,000 so that provable damages can be compensated up to an overall limit of $325,000. To this end representatives of the Government departments and agencies involved in matters affecting international civil aviation, including the Departments of State, Transportation, Justice and Commerce as well as Civil Aeronautics Board and the Federal Aviation Agency laid down guidelines to be followed in making proposals for a plan to provide additional compensation. The Government representatives also sought advice and suggestions from a wide range of individuals, groups and institutions, including the academic community, the plaintiff bar, and the insurance industry as well as the airlines, as to how best to meet the Government's objectives. After considering the suggestions and recommendations they received, the Government representatives decided to foster a privately operated supplemental compensation plan taking the form of an agreement between the airlines serving the United States and a third party who would administer the Plan. Refinements of the concepts embodied in the agreement and the search for someone to manage the Plan were conducted under their auspices.

These efforts culminated in a Supplemental Compensation Agreement between the airlines serving the United States and the Prudential Insurance Company of America, styled "Contractor" by the Agreement. I am attaching a copy of the Comments in Support of the Supplemental Compensation Agreement (Attachment "B") filed with the CAB on behalf of the airlines and their Consolidated Reply to the Answers to the Application for Approval of the Agreement (Attachment "C"). They set forth an explanation of the Supplemental Plan in some detail and address the arguments made against the Plan, including an indepth discussion of its benefits and cost.

Very simply the Agreement obligates the airlines to publish tariffs specifying a surcharge—$2.00 at the outset, and as a function of experience thereafter—applicable to all international transportation sold in the United States on flights departing the United States for a foreign destination. These surcharges will be transmitted to Prudential who will be liable without fault up to an additional $200,000. Anyone who has paid the surcharge and any permanent U.S. resident who is subject to the Protocol regardless of whether he paid the surcharge, may join Prudential as a defendant in any action against an airline wherever that action is brought.

Prudential has agreed to be joined in such actions anywhere in the world. However, the chances that an American citizen would be forced to sue in a foreign court have been rendered most improbable by another provision of Protocol 3 authorizing suits in the territory of any nation participating in the Convention in which the airline has an establishment. This would mean that an American citizen traveling on a foreign carrier between points outside the United States, say from Rome to Paris, could bring suit in an American court if the airline has a ticket office anywhere within American territory.

The Supplemental Compensation Agreement will bring the overall limit under the new regime to $325,000. This is the level to be considered by the Committee in deliberating on the Protocol.

In judging the adequacy of this limit it is important, as I have already stressed, to bear in mind that by removing fault as an issue to be litigated or as a bargaining point in settlement discussions, the Protocols assure that the time between filing a claim and receipt of compensation will be shortened significantly.

But the Protocol does not leave it there. The so-called "settlement inducement clause," would subject an airline to payment of costs, including attorney fees, over and above the Protocol limit if it fails to make a written offer of settlement within six months following receipt of the notice of claim that is at least equal to what the court awards if the matter goes to trial.

The amount of costs to be awarded would, of course, be up to the court and would depend upon a number of factors, including the carrier's good faith in making the offer of settlement, the inconvenience suffered by the claimant in the meantime and the disparity between the offer and the ultimate award. In some cases, therefore, it could be expected that additional amounts would be recoverable from the airline. The possibility of incurring this added cost plus the expense involved in litigation over an honest difference of opinion within the range of the carrier's liability, almost guarantees that the airline will tender payment well within six months.

Although the settlement inducement clause of the Protocol is directed only against the airline, the agreement setting forth the Supplemental Plan obligates Prudential to settle claims within sixty days after the carrier's settlement. It could not, therefore, delay settlement with impunity. Moreover, Prudential would have little to gain from litigating small differences in the value of a claim. Thus compensation up to $325,000 should be forthcoming promptly under the new regime, without the delays experienced under the existing Warsaw system or the domestic tort system.

Opponents of the system established by Protocol 3 find it difficult to quarrel with the objective of assuring victims that they will be compensated. And even those who do, usually claimant attorneys, are hard put to dispute the value, economic and societal, of speedy recompense. So they attack the level of the limitation, calling it inadequate. They point selectively to recoveries received by American citizens in non-Warsaw cases brought in the United States and contend that no limitation is adequate if it is less than the occasional more spectacular domestic recovery. However, we submit that a comparison of the $325,000 limit with domestic recoveries, assuming that to be a valid comparison, supports the reasonableness of the limit.

There is always a lag in collecting and analyzing recoveries. This is because under the tort system where things such as negligence are in issue the pace is very slow—in the case of settlements as well as judgments. As a rule airlines, much the same as other defendants in tort actions, are reluctant on their own account, or at the behest of their insurance underwriters, to release such information until all or most claims arising out of a particular accident have been settled. They are understandably apprehensive that knowledge of the level at which one claim is settled might affect the settlement of another claim. In some instances they are restrained from doing so by court order.

The best and most comprehensive information available on domestic recoveries is contained in a survey of the Civil Aeronautics Board entitled "Levels of Recoveries on Account of Passenger Deaths and Serious Injuries in Airplane Accident." The original survey covered settlements with respect to accidents occurring in calendar years 1960 through 1969, and was later updated by the CAB through the first half of 1974. Let me compare several aspects of Protocol 3 and the tort system in terms of the CAB surveys in order to illustrate the advantages of the new system to claimants. I will then review the available information on recovery levels since 1974 which, I submit, corroborate the general level established by the CAB survey.

The Board survey, including the 1974 data, shows that 84 percent of the non-Warsaw recoveries for death were less than $300,000 and that 91 percent were less than $300,00 in injury cases. These are revealing figures. However, to give them full meaning in the context of Protocol 3 and the Supplemental Plan it is important to determine how long it took for the compensation to reach the claimant. The Board's updated survey does not reflect the elapsed time between the date of the accident and the date of the settlement. But a good indication of the pace at which the tort system operates can be gleaned from the earlier Survey covering settlements (including judgments) with respect to accidents occurring in the period 1960 through 1963.

In the recovery range of greatest concern for present purposes, those between $100,000 and $300,000, only 61 percent of the claims were settled within four years and only 69 percent within five years. This information is taken from Table III(A) of the CAB Survey. In the range between $300,000 and $500,000, only 15 percent of the claims had been settled within five years. In the $75,000 to $100,000 range, 20 percent of the claims remained unsettled after 5 years.

Table III(B) of the Survey shows the average time required to settle in the respective recovery levels. It reveals that the average time required to settle claims above $100,000 was 4.2 years. The average time was 5.4 years for claims exceeding $200,000., 6.5 years for those over $300,000 and 3.6 years for those exceeding $500,000.

As I have noted, most of the non-Warsaw recoveries through the first 6 months of 1974 were below $300,000. This alone supports the reasonableness of the $325,000 limit. Moreover, when the time required to receive the settlement is factored in, the benefit to the claimant goes up markedly. I realize that in future cases some claims may be settled earlier than reflected in the Survey and that some will take longer. But in cases where proof of fault is involved and where there is no time limit, there is little likelihood that very many settlements will be made within 6 months.

Based on the settlement lags I have mentioned, difference in time within which compensation will be received under the Protocol 3 regime and under the present domestic system will be about 4 years on the average. As of September 7, 1981, AA corporate bond were yielding 15.38 percent annually. The investment of $325,000 at this rate would produce a total of capital and interest at the end of 4 years of about $575,977.

It is harder to quantify precisely the accretion assignable to receiving a $325,000 settlement when it is used to avoid or retire interest bearing debt or simply to pay bills. Yet it is easy to preceive that in these situations too, a claimant's net position will actually be well in excess of the $325,000 recovered.

Another factor bearing very significantly on the claimant's net position will be the diminished need for legal services, particularly those of the specialists I have mentioned, whose services are of high quality—and high costs. Reducing the impact of the attorney fee, usually a contingency fee, or the recovery means, quite obviously, that the claimant will get more. Contingency fees vary from time to time and place to place. One-third is the figure often mentioned. Some may be higher and others may be lower. To illustrate the advantage to a claimant of a virtually automatic system where the specialized lawyer may not be needed, if the fee is calculated at 30 percent a $500,000 recovery is cut down to $350,000 which has a present value of $200,000 computed at 15 percent and 4 years. If the fee is more, of course, the claimant's take-home recovery is further reduced bringing it even closer to the Protocol limit.

The shocking impact of contingency fee agreements in aviation accident litigation so outraged a Federal judge handling cases arising from the 1979 American Airlines DC-10 tragedy that in March of this year he temporarily embargoed payments of damages until the court was satisfied that the attorney's portion of the award was not excessive. The cause of the judge's outrage: one case in which two attorneys, apparently receiving $10,000 to $15,000 per hour for their labors, collected $383,244 in fees—$13,000 less than the widow and $26,000 more than the deceased's two infant children. A second case, in which the lawyer received a $172,000 fee for negotiating a $550,000 settlement, leaving $278,000 for the widow, and $33,000 for each of three children, ranging in age from 12 to 15. A third case, in which the lawyer received $83,333 for negotiating a $250,000 settlement, of which the widow received $129,167 and each of three children ranging from 19 to 24 received $12,500. And a fourth case, in which the law firm received a $94,434 fee for negotiating a $450,000 settlement, with the widow receiving $240,000 and her two children, 14 and 18, each receiving $55,000.

The judge, one of two senior Federal judges handling the consolidated litigation in Chicago, described what he was seeing in such terms as "a good shafting" and "gouging", "excessive" and "seriously out of line." Such strong language should become a thing of the past in the Montreal Protocol/Supplemental Compensation Plan regime of the future, in which general practitioners rather than high-priced specialists should suffice for aggrieved parties seeking equitable, swift and certain recoveries.

As I have mentioned, the CAB survey remains the most authoritative source of the level of recoveries in Warsaw and non-Warsaw cases. It confirms the adequacy of the $325,000 limit that would be set by the new system. However, the Department of State has examined additional recoveries and the results of this examination, communicated to Senator Biden by letter of May 12, 1978 from the then Assistant Secretary of State for Congressional Relations, reveal that through the year 1977 the levels remained essentially the same as those determined from CAB's survey.

The Department's examination was based on information it compiled on recoveries in most of the major aviation accidents involving American carriers beginning in 1965 and continuing through 1977. The Department defined a major aviation accident as one in which there were 15 or more deaths or serious injuries.

This analysis included a total of 553 non-Warsaw cases. Of that number, 1,395 (90 percent) of the recoveries were less than $325,000. Forty-six or 3 percent were settled between $325,000 and $400,000 and 117 (7 percent) were above $400,000. To test further the assertion of some of the claimant's attorneys that the trend in recoveries was significantly upward, the State Department considered non-Warsaw cases settled from 1974 to 1978. A total of 663 were settled during this period. Of that number, 573 (86 percent) were for $325,000 or less, 17 (3 percent) were settled between $325,000 and $400,000 and 73 (11 percent) were above $400,000.

A thoroughly documented survey of settlements in connection with the 1974 Turkish Airlines crash in Paris was compiled in Status Report No. 172 by Judge Pierson M. Hall who presided over the multi-district litigation Panel, before which this matter was litigated. This comprehensive report (Attachment "D") supports the State Department survey just discussed by showing that the overwhelming number of settlements made in that case were below $325,000. Specifically, the settlements examined by Judge Hall reveal that 81.2 percent of the gross awards fall below $325,000, another 4.7 percent $325,000 and $400,000. After eliminating litigation coasts and legal fees, 85.9 percent of the net awards were below $325,000 and 5 percent between $325,000 and $400,000.

Judge Hall's report, like the CAB analysis, records the slow pace of the tort system, and reveals how it diminishes even spectacular recoveries. By doing so, it also confirms the adequacy of the limit that would apply at the outset of the new system. Any number of the cases set forth in the report illustrate the point. For example, in Case No. 11 a judgement was entered for $90,000, well below the $325,000 limit. Of this amount, the claimants received $56,000 in April of 1977, three years after the accident.

Case No. 189 involves a judgment for $425,000. This, of course, would exceed the $325,000 limit. Yet, the net award to the claimants (three minor daughters, a wife and a brother) was only $303,197 and was not received until August 1977—almost 3½ years after the accident. Case Number 224 was a judgment for $900,000, well above the $325,000 limit. The net award, however, was only $571,000 and was not received until two years, after the accident.

In the last five years, there have been five major accidents involving one of our carrier members. Although all of the claims have not been settled in all of those cases, making it impossible to know the level of each and every settlement, we have obtained preliminary information on the recoveries for the great bulk of the victims of these five crashes. Let me stress that the settlement figures are preliminary. However, the available information, as in the case of the foregoing analyses, indicates that the level of settlements have not increased significantly over the levels set forth in CAB's 1974 update. Of the 775 cases on which we have information, 665 or 85.8 percent were concluded under $325,000.

Thus the information compiled by the State Department, Judge Hall's report and our own tentative survey of the five recent accidents, all corroborate the CAB study and further attest the adequacy of the $325,000 limit. It would be foolish to say that the domestic recoveries will not vary upward or downward from time to time. But the level of recoveries noted in the surveys discussed above suggest that the overall limitation on recoveries contemplated by the new system is in line with actual experience. In other words, the $325,000 limit of the updated Warsaw system is reasonable and compares favorably with most domestic recoveries at this time.

Unlimited medical and hospital benefits

Another aspect of the regime that would be of substantial value of claimants if Protocol No. 3 is ratified—one that must not be ignored—is the medical and hospital benefits available under the Supplemental Plan. The Agreement provides for unlimited payment by Prudential of hospital and medical benefits as they come due. The skyrocketing cost of hospital and medical care has been common knowledge for several years and is a matter of critical concern today to Congress and the Administration. It probably has touched every member of this Committee. The hospital and medical benefits provided by the Agreement run to those who need them most, to passengers who are seriously injured and who require long, and in some cases indefinite, hospitalization. Serious burn cases come to mind as the kind of injury that requires very expensive medical care and protracted and recurrent hospitalization.

The conclusion is inescapable that a seriously injured survivor is better protected under a system whereby his hospital and medical bills are reimbursed in full than he is as a recipient of one of the spectacular judgments which he or his representatives must first of all struggle to receive, and then share with inflation and the attorneys and other specialists needed to obtain it.

This feature must be counted as an extremely important benefit, one that surely outweighs leaving the victim hostage to the long, expensive fault game in the hope that in a few cases he might recover a higher judgment than permitted by the new system.

Cost of the supplemental plan

Since there has been no experience under the Plan itself, a certain amount of judgment enters into determining what the initial surcharge should be, but it is not a random judgment. Relevant airline claims experience must be considered. And, of course, the Government's requirement that at least 90 percent of the collections be available for payment of benefits to claimants must have a major influence on the level of the charge, as does the Government's insistence upon an automatic adjustment formula. And, to a degree, the need to build up the Fund in order to avoid frequent changes in the level of charge must be taken into account.

Opponents of the new regime have chosen to ignore the government standards altogether. These requirements are admirable from the standpoint of the passenger, but they present severe business limitations, especially the 90 percent pay-out requirement. In other words the opportunity for significant profits has been eliminated. No doubt this explains why, despite comprehensive efforts, including advertising in the Wall Street Journal and Journal of Commerce, to interest individuals and organizations in serving as Contractor, very few expressed an interest.

The opponents also appear to believe that the level of the beginning surcharge under the Plan should bear a relationship to the cost of domestic airline insurance. They take no cognizance of the difference in the incidence of accidents in international versus domestic air transportation.

Mr. Alan Ferguson, Vice President and Actuary of Prudential, has tendered a statement to the Civil Aeronautics Board in which he explains how these and other factors are applied in arriving at the $2 charge. That statement is annexed to the Consolidated Reply filed with the Civil Aeronautics Board which is Attachment "C" to my statement. Mr. Ferguson will make a statement of his own to the committee. I am also certain that he will be pleased to answer any questions you may have on this subject.

Ticket and baggage requirements

The death and injury sections of Protocol 3, for obvious reasons, are the most important aspects of that Protocol. They have rightly attracted the most attention. Nevertheless the Protocol does make changes in the liability relationship between the passenger and the airlines with regard to baggage. It also changes the documentation requirements applicable to tickets and baggage checks, to make them compatible with today's—and tomorrow's—passenger check-in procedures. They deserve a few words.

Today, under the existing convention, the airline forfeits its right to limited liability if it fails to deliver a ticket to the passenger containing the information specified in the Convention. That information includes the place of departure and destination and agreed stopping places, the name and address of the airline or airlines, and a notice of the limitation established by the Convention. The same rule applies in the case of the baggage check on which even more information must appear, including the number and weight of the packages. The ticket and baggage check may be a combined document as I am sure most of you who have examined your international ticket have observed.

Protocol 3 continues the requirement that both ticket and baggage check contain the place of departure and destination and any agreed stopping point. But it permits the carrier to use "any other means" which would preserve a record of the required information without forfeiting the liability limit. This change was made to permit the development and use of computer ticketing and, eventually, automated check-in procedures. Some of the U.S. domestic airlines have already taken first steps toward computer ticketing. The changes made by Protocol 3 will permit the use of the new technology for international journeys as well.

Another domestic innovation that has done much to reduce congestion at airport check-in points is the change from the baggage weight allowance to the piece allowance. For about 14 years now most domestic carriers have been allowing two pieces of baggage regardless of the weight of the bags. At most major airports this permits the passenger to check his suitcase either at the curb or, in some cases, immediately upon entering the terminal without encountering the long lines that were common when the suitcase had to be weighed. This concept cannot be extended to international travel without vitiating the established limit as long as the Convention requires that the weight and number of bags be entered on the baggage check. These requirements will be eliminated paving the way for streamlined international check-ins which do not involve weighing and counting pieces of checked baggage.

The time required to check international baggage, of course, differs depending on the physical set-up at the airport. A survey by one of our member airlines put the time for weighing and recording the information as required by the Convention at approximately 14 seconds. In other words, an additional hour and a half would be required for one wide body aircraft, say a Boeing 747, accommodating 360 passengers.

The current treaty makes a distinction between checked and unchecked baggage in specifying the limitation on recovery. Liability is limited to 250 francs per kilogram ($9.07 per pound) if the baggage is checked. Unchecked baggage, articles one takes into the cabin, are subject to a flat limit of 5,000 francs ($400) per passenger. Protocol 3 would eliminate this distinction and establish a single, per passenger limit of 1,000 SDRs (approximately $1,250). This is a constructive step and it should speed up claim settlements by eliminating the difficulty some times encountered in determining whether or not an "article" was checked or unchecked baggage—for example, a coat stored in the cloak room or luggage in the rack on board the aircraft.

PROTOCOL NO. 4—CARGO AND MAIL

Like the sections of Protocol 3 dealing with baggage, Protocol 4 is less in the public's eye than the death and injury provisions of Protocol 3. They are, however, important both to the shipper and to the airlines. And, of course, mail is a matter of interest to us all.

Cargo

The limitation on recovery for lost or damaged cargo is essentially unchanged by the new Protocol. As in the case of Protocol 3, the limit is expressed in SDRs rather than gold francs. This alters the dollar value slightly but not significantly. For instance under the Warsaw limit it is 250 francs per kilogram (approximately $9.07 per pound). Protocol 4 specifies 17 SDRs per kilogram which still comes to approximately the same amount.

The new Protocol extends the no-fault concept to cargo although not as completely as in the case of Protocol 3's treatment of passengers and baggage. Airlines, are, therefore, held strictly liable for lost or damaged cargo but several defenses are permitted. They are: "(a) inherent defect, quality or vice of cargo; (b) defective packing of cargo performed by a person other than the carrier or his servant or agent; (c) an act of war or an armed conflict; (d) an act of public authority carried out in connection with the entry, exit or transit of the cargo."

These defenses are included out of recognition of the necessary involvement of persons other than airline employees in handling cargo—for example, packing which is usually done by the shipper, and inspections at ports of entry performed by government officials. They also take cognizance of the fact that an airline has no practical means of coping with inherent defects such as is sometimes the case in shipments of fragile electronic tubes. These defenses also take into account the fact that most commercial shippers are aware of the limitations on what can be expected of an airline and are in a position to insure against those contingencies while taking advantage of the strict liability imposed upn the airline, in most instances.

Protocol 4 also makes a number of changes in the documentation requirements imposed by the original Warsaw Convention. Many of the detailed entries and procedures to be followed in receiving cargo, processing it through customs and releasing it to the consignee, requirements that were useful in their day, are a barrier to adjusting airline cargo handling procedures to modern commercial practices made possible by use of computers and electronic transmissions.

For example, the present Convention, if its limits are to apply, requires that an air waybill containing information specified in 10 separate paragraphs be made out in three parts and "handed over with the goods" to the airline. The airline must then sign the air waybill "on acceptance of the goods." This means that the consignor must have cut the waybill before the cargo arrives at the airline receiving dock or wait as the airline makes it out. Meanwhile the goods are being held at the dock since the airline cannot accept the shipment or sign the air waybill until it is handed over by the consignor. In other words the cargo cannot be loaded until the paperwork is completed, the goods are accepted and the waybill signed by the carrier.

The waybill also must be physically attached to the shipment and accompany the shipment to its destination. In addition, information necessary to meet government formalities (customs, octroi or police) likewise must be attached to the waybill. Customs inspectors frequently can do nothing until all the cartons comprising the shipment are accounted for and tendered to them.

It is, I believe, easy to see that the result of these requirements is delay on both ends of the line. I submit that it seems unnecessary in the era of space exploration and communication satellites that delays of 5 days or more in delivering shipments to consignees occur, all too often, at some of the gateways of the world.

As in the case of the passenger ticket and baggage check under Protocol 3, Protocol 4 will permit the airline, with the consignor's consent, to substitute another means which would preserve a record of the carriage to be performed without forfeiting the liability limit. This would permit the cargo to be received on the basis of a letter of instruction from the consignor with the air waybill completed later and rate information that is stored in a computer entered at the same time.

At the destination, the new Protocol would only require that the information needed for formalities "be delivered before the cargo can be delivered to the consignee." This could be done instantaneously by electronic means and customs would be able to process the cargo immediately upon the arrival.

Mail

The Warsaw Convention does not apply to transportation performed under the terms of any international postal convention. It is covered by Protocol 4, the provisions of which are brief and straight forward. That Protocol makes the carriers liable to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the administration.

Therefore, for the first time the Convention will contain a clear statement of airline liability for the carriage of postal items. Thus Protocol 4 in addition to modernizing cargo and baggage documentation requirements will fill a gap that has long existed regarding responsibility in the carriage of mail.

CONCLUSION

Protocols 3 and 4 make changes in the Warsaw Convention that are long overdue, both in the liability system itself and the documentation requirements. The significantly increased liability limits of Protocol 3 plus the extra benefits provided by the Supplemental Compensation Plan, all of which are likely to be received within 6 months (surely within 8 months) and the provision in the Plan for unlimited hospital and medical benefits to be paid as bills come due, represent a major advance in compensating victims of international air crashes—to the benefit of claimants, the airlines and the public generally.

This regime, the handiwork of the U.S. Government, will permit the United States to continue its participation in this almost universally subscribed treaty which, in turn, will be beneficial in its relations with other nations on other important aviation matters. Action by the United States on these Protocols has been too long delayed. The Protocols merit immediate implementation. If they are not ratified, the credibility of the United States will be called into question and its continuing leadership role in the world aviation community will be jeopardized.

On behalf of our airline members, I would like once again to urge that the Senate give its advice and consent to ratification of the Montreal Protocols.

Senator KASSEBAUM. Thank you, Mr. Landry.

Mr. Hitchcock?

STATEMENT OF CORNISH F. HITCHCOCK, LEGAL DIRECTOR, AVIATION CONSUMER ACTION PROJECT, WASHINGTON D.C.

Mr. HITCHCOCK. Thank you. Madam Chairman and Senator Helms: Since my statement has been submitted for the record, I would like to summarize it orally in about 5 minutes, if I may.

It is a privilege to be here this morning to discuss this issue. In listening to the debate about the adequacy of the recovery figures, I was reminded a bit about the old Scottish jury system, where you have not only verdicts of guilty and not guilty, but also not proven. I think that is the situation we are in here with respect to the case for ratification and Senate advice and consent of the protocols. The data is in dispute rather seriously, and we do not believe there is an adequate factual basis to warrant Senate approval at this time.

We believe that the Senate, as well as the public at large, could get a full record if the Civil Aeronautics Board is to conduct an on-the-record evidentiary hearing, which we have formally petitioned for. That request is still before the Civil Aeronautics Board.

We think it is critical to have a full record on these protocols because they would radically change the liability regime which has governed international aviation for the past 50 years. We are disturbed by the suggestions from experienced trial counsel that the new liability ceilings could limit recoveries in the future to below those levels actually being recovered today.

The main area of concern with the new protocols is that the liability ceiling is absolute. Under the current regime there is a possibility of breaching the Warsaw Convention and recovering more full liability if willful misconduct is proven, and there have been a number of cases where the Warsaw ceilings have been breached.

Our concern here about the statistics is that the ones provided by the CAB when it approved the supplemental compensation plan preliminarily are somewhat out of date. At the moment they are, at a minimum, 7 years old, and at worst 21 years old. Even the most recent figures I have seen cited in Mr. Landry's testimony, I think, go through 1978, and there has been quite a bit of inflation more recently than that.

Second, we have provided an affidavit in our petition to the board in which an experienced trial counsel suggested that a figure like $317,000 or $320,000, rather than being a ceiling on liability, more often than not is a startup figure for negotiations when a breadwinner is killed in a plane accident, leaving a family behind.

The committee has in its records a study which was submitted 4 years ago by the researchers from Cumberland Law School, which found a number of gaps in the Board's accident figures and concluded:

> That it is safe to say that if all settlements were reported the recovery level of the average settlement would be noticeably higher than those determined by the Civil Aeronautics Board.

It is a bit difficult at this type of hearing to get into a debate on who is right and who is wrong. That is why we thought in an on-the-record hearing it would be most helpful to the committee, Members of the Senate, and the public for us to figure this out once and for all. Many times you have to make a decision without all the evidence and make a best judgment call. But in this case there is a mechanism for providing the Senate and the committee with evidence.

I would like to touch briefly, if I may, upon the supplemental compensation plan and the $2 surcharge. It is somewhat ironic that nowadays insurance and liability coverage is part of the ticket and you have the possibility of total recovery, whereas under the protocols passengers would have to pay $2 for a limited recovery.

I think what is particularly noteworthy is a recent statement from foreign air carriers last year before the Board to the effect that they now can purchase unlimited, fairly substantial coverage, enough to compensate all the victims of a major air disaster at the market rate. In other words, insurance is cheap and available.

The CAB last year proposed a rather high liability figure. Instead of a $75,000 maximum coverage, they proposed $300,000 per passenger plus $300,000 times 75 percent of the seats on the aircraft; 17 major airlines filed joint comments in which they objected not to the amount, but to the principle, that is, the U.S. Government was trying to impose liability requirements on companies that may be regulated in their home country.

What they said is that the current levels, and I quote now, "were stated at a level so far below carriers' actual insurance coverage as to pose no real problem." That refers to the $75,000 figure. "The same is still true of the amounts of insurance coverage now proposed by the Board. The foreign air carriers believe that on inquiry the Board would accept that the new proposed minimums are still far below the actual insurance coverage effected by foreign air carriers."

And Philippine Airlines in particular pointed out that it carries $400 million of insurance, for instance. So for a 400-seat aircraft, that is a lot of liability per passenger.

So for this reason we question the argument that there has to be a cap on recovery and the implication that insurance coverage is not readily available, or that somehow you would not get your recovery as quickly. There has been some dispute about that between the parties in the first panel.

In closing, I would like to say once again that we do not believe that the proponents of the Montreal protocols adequately have explained or assured that the radical changes under the new system would protect international travelers and their families as well as, if not better than, the current system. We believe that the committee does have the mechanism for having the Board hearing for making a full and final determination of who is right and what the situation is for recoveries, not only today but for many years to come.

Thank you.

[Mr. Hitchock's prepared statement follows:]

PREPARED STATEMENT OF CORNISH F. HITCHCOCK

Mr. Chairman members of the Committee, on behalf of the Aviation Consumer Action project (ACAP), I appreciate the invitation to testify this morning on Montreal Protocols Nos. 3 and 4 to the Warsaw Convention.

ACAP has long been interested in the rights of international as well as domestic air travelers.[1] Over the past 10 years, we have taken part in a number of proceedings before the Civil Aeronautics Board and other federal agencies on international aviation issues. ACAP is presently a party in the CAB's investigation of the Supplemental Compensation Plan, which is an integral part of the regime which the Montreal Protocols would establish to govern liability in international aviation accidents.

More than four years have passed since this Committee last examined these Protocols, and the current hearings are thus timely and useful. At the end of the 1977 hearings, then-Chairman Sparkman stated that there was sharp conflict in the factual data presented to the Committee about the adequacy of the recovery levels contained in the Protocols and that the Committee would defer action until these factual disputes could be resolved. Today, the data is still in dispute, and there is not an adequate factual basis to warrant Senate approval at this time. Thus, ACAP believes that the Committee should continue to defer action on the Protocols until pending administrative and court proceedings, which can provide such a record, have run their course.

Having a full record on these Protocols is crucial because they would radically change the liability regime which has governed international aviation for the past 50 years, and several experts have suggested that the new liability ceilings could limit recoveries in the future to levels below those received following accidents today.

In order that the public could have a full understanding of the impact of these Protocols, ACAP petitioned the CAB to hold a formal hearing to determine whether the new liability ceilings would adequately compensate the victims of international air crashes and their families. Our petition is still pending before the Board. In addition, we are a party in litigation now before the U.S. Court of Appeals here in Washington, which challenges the Board's preliminary approval of the Supplemental Compensation Plan. That action has been stayed pending the Board's review of the matter.

To assist the Committee in evaluating our recommendation for deferred action, let me briefly trace the operations of the Warsaw Convention and the Montreal Protocols and then discuss some of the specific concerns we have with the proposals on the current record.

Drafted in 1929 and adopted by the United States in 1934, the Warsaw Convention limits liability of international airlines to their passengers when accidents occur. As originally drafted, the liability ceiling (expressed in terms of gold francs when gold was worth $35 an ounce) was approximately $8,300. The Hague Protocol of 1955 would have doubled that amount, but that Protocol was never reported out of this Committee.

The U.S. Government has long protested the Warsaw liability ceiling as being too low to compensate U.S. citizens adequately. In 1966, following a U.S. move to renounce the Warsaw Convention, a number of United States and international airlines agreed to waive the Warsaw limit up to $75,000 on flights to, from or through the Untied States and to accept absolute liability for death or injury on such flights. This "Montreal Agreement" has remained in effect for the past 15 years.

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[1] Founded in 1971, ACAP is the only non-profit consumer group working full-time on aviation issues. It is supported entirely by direct contributions from the public and has provided assistance to tens of thousands of travelers over the years. ACAP has appeared in many proceedings before the federal agencies which regulate aviation safety and economics, has testified on numerous occasions before Congressional committees and published a variety of reports, studies, and informational materials for the public. One study by the Senate Governmental Affairs Committee called ACAP the principal consumer representative before the CAB.

In the area of international aviation, ACAP has since 1977 served as an adviser on a number of U.S. delegations negotiating bilateral route and rate agreements with foreign nations. In addition to the proceeding involving the Supplemental Compensation Plan, ACAP has taken part in a number of other CAB proceedings affecting international air travel. ACAP has testified on various legislative proposals in this area, including legislation which evolved into the International Air Transportation Competition Act of 1979, and litigation initiated by ACAP produced holdings that international route awards recommended to the President by the CAB must be made public and that the Board must thoroughly scrutinize general fare increases collectively proposed by international carriers instead of giving rubber-stamp approval to the requested amount.

The Guatemala City Protocol of 1971 reflected a further effort to raise the Warsaw liability ceiling and to let nations establish plans to provide supplemental compensation over and above the proposed new liability ceiling of $99,600.

The Guatemala City Protocol—with the higher liability ceiling and the provision for a Supplemental Compensation Plan—is embodied in the Montreal Protocols now before you with one significant change. The liability ceiling is now expressed in terms of Special Drawing Rights, a change insisted upon by several nations when the U.S. dollar was devalued in the early 1970's and the market value of gold rose to several hundred dollars an ounce. The Montreal ceiling is approximately $116,000, based on the value of Special Drawing Rights, whereas if the Guatemala City gold-based ceiling had been retained, liability would have been approximately $1.34 million per person, assuming the market value of gold, now worth roughly $425 an ounce, is used as the benchmark.

In late 1975 efforts got underway to seek approval of this new regime in the United States. Prudential Insurance Company reached agreement with 44 United States and international airlines to establish a Supplemental Compensation Plan (SCP) to provide a higher liability ceiling for passengers traveling abroad on tickets purchased in the United States. The Prudential SCP would have raised the liability ceiling $200,000 above the $116,000 level at an initial charge to the public of $2 per ticket. That agreement was submitted to the CAB for approval under section 412 of the Federal Aviation Act.

In July 1977, only a few days before this Committee held hearings on the Protocols, the CAB approved the SCP agreement. ACAP promptly petitioned the Board to reconsider the decision on the ground that it was based on outdated and erroneous data about accident recovery levels, that the Board had failed to give consideration to the anti-competitive aspects of the plan and that the Board had to hold a hearing before imposing a passenger surcharge to pay for the SCP. I have attached a copy of our petition to give you a more detailed statement of our position, and, as I noted earlier, the Board has not decided whether to grant our petition.

With that background, then, let me turn to the Protocols themselves and explain why we believe it is so critically important that any revision of the Warsaw Convention be based on an adequate factual basis and that any Protocols approved by the Senate adequately compensate passengers and their families for loss arising from an international air crash.

At $75,000, the current Warsaw recovery for U.S. travelers is very low. There is, however, an important safety valve. If a plaintiff can prove that death or injury was caused by "willful misconduct," then the ceiling can be breached, and a passenger or his survivors can recover the full amount of liability. As inflation has made first the $8300 and then the $75,000 figure obsolete, this willful misconduct exception has been an important means of assuring that travelers to, from and through the United States are fully compensated for loss in an international air accident.

The Montreal Protocols stand this regime on its head. Admittedly, the ceiling is raised to $316,000 if the SCP is approved. However, the trade-off is the elimination of the willful misconduct exception. In other words, if the Montreal Protocols are ratified, the $316,000 ceiling will be absolute, and passengers and their families will not be able to recover compensatory damages from the airlines beyond that amount, no matter how great the loss or how egregious the airline's actions. If liability is to be fixed at that sum, the Senate must be certain that it is a level which will adequately compensate the victims of accidents not only today but for many years to come.

ACAP believes that full development of a record on this issue is important because there are disturbing indications that the $316,000 figure may be already obsolete, despite the claims of the government agencies which support the Protocols.

The CAB statistics which support the $316,000 level are based on recoveries between 1960 to 1974 and are at least 7 and at worst 21 years old. Significantly, they do not take into consideration the hyper-inflation which has gripped this country for the past 4 years.

Experienced trial counsel have stated that the CAB recovery data are incomplete and erroneous and tend to ignore some of the larger settlements of which they are aware. One attorney stated in an affidavit attached to our petition that a "sum like $317,000 is more often than not a start up figure at which negotiations commence, or first offers are made, in cases where the breadwinner has been killed, leaving a wife and children." He cited the example of a $1.5 million recovery for the family of a husband and wife who were killed, leaving two children, in the March 1974 Turkish Airlines DC-10 crash near Paris.

Two researchers from Cumberland Law School did an independent analysis of the accuracy of the CAB recovery statistics and found them "questionable at best" in testimony before this Committee. The researchers noted that the statistics were supplied voluntarily to the Board by U.S. carriers, which have an obvious interest in keeping large damage awards and settlements from public view. After their own, more thorough review of recovery levels, the Cumberland researchers found it "safe to say that if all settlements were reported, the recovery level of the average settlement would be noticeably higher than those determined by the Civil Aeronautics Board." Their report suggests that the $316,000 figure may be obsolete before it ever takes effect.

More importantly, though, the fact that passengers would be assessed a surcharge suggests that recovery up to $316,000 would somehow be unavailable under the current regime, or at least not as readily available as the Montreal regime would allow.[2] The available evidence, however, suggests that airlines have no trouble obtaining insurance at levels considerable above $316,000 per passenger and that such insurance is available at reasonable cost.

In the first place, U.S. airlines are fully insured, since most of their operations are domestic, where liability is virtually unlimited. In addition, a number of leading foreign carriers last year told the CAB, in effect, that they carry insurance which is adequate to make full payment even if a jumbo jet crashed killing all on board.

In early 1980 the Board proposed raising the minimum insurance coverage for foreign carriers operating to and from the United States from the Montreal Agreement level of $75,000 per passenger to a level of $300,000 per passenger, plus $300,000 times 75 percent of the seats on the aircraft per occurrence. Significantly, the foreign carriers which responded to this proposal objected not to the proposed amounts, but to the principle, i.e., the United States should not be setting insurance levels for foreign airlines whose insurance requirements may be regulated by their home country.

Seventeen major foreign airlines, filing through IATA,[3] acknowledged that their principle has already been compromised because carriers have previously accepted insurance requirements in the CAB permits. They explained, however, that airlines—

Have acquiesced probably largely because the Board's requirements were stated at a level so far below carrier's actual insurance cover as to impose no real problem. There is no point protesting a regulation if it has no practical effect.

The same is still true of the amounts of insurance cover now proposed by the Board. The Foreign Air Carriers believe that, upon inquiry, the Board would accept that the new proposed minima are still far below the actual insurance cover effected by foreign air carriers.

These sentiments were echoed by foreign carriers filing individual comments. Philippine Airlines, for instance, noted that "[m]ost foreign airlines maintained insurance coverage well in excess if minimums stated in proposed § 205.5, and PAL's coverage in particular of $400,000,000 per one occurrence adequately meets the amounts that would be required by the Board's proposed rule."

These candid admissions provide a good indication of just how inadequate the Warsaw limitation is in the eyes of leading international carriers which, if willful misconduct is proven, must be prepared to compensate the victims of a crash at levels far higher than the Warsaw ceiling. The risk that the Warsaw ceiling will be breached is a real one for international carriers wherever they fly, for the chances are good that U.S. citizens will be on board or that victim of a crash will have U.S. dependents who will bring suit in the United States courts, where recoveries are more generous than in courts of other nations.[4]

The available evidence also suggests that this extensive insurance cover is available at reasonable cost. This was suggested in the May 19, 1978 New York Law Journal where John Brennan, president of the United States Aviation Underwriters, which manages one of the two major aviation insurance groups in this country, was quoted as saying: "It is incredible to observe the amount of misinformation that is circulated regarding the cost of aviation insurance. For instance, during 1977 the U.S. airlines paid about 40 cents per passenger per round trip for liability insurance limits of up to $400 million per occurrence; 90 percent of these flights were domestic so therefore involved an unlimited liability exposure. Contrast that 40 cent charge with the $2 per passenger round trip charge that advocates of the Supplemental Compensation Plan to the Guatemala Protocol wish to charge for $200,000 excess of $100,000 per passenger. I am still laboring mightily to understand that program."

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[2] Supporters of the plan have also suggested that the existence of a SCP fund to pay claims will provide for faster settlement of cases than is possible under the current litigation regime. Experienced trial counsel have testified and provided evidence suggesting that such litigation today proceeds rather quickly, and the Cumberland study calls into question the speed and certainty of recovery even with the SCP. At an evidentiary hearing before the Board, those issues would, we hope, be thoroughly aired and resolved.

[3] Air France, Air New Zealand, British Caledonian, CP Air, Czechoslovak Airlines, Lufthansa, Finnair, KLM, Olympic, Pakistan International Airlines, Quantas, Sabina, Saudi Arabian Airlines, Swissair, TAP, UTA, and VARIG.

[4] For instance, a jury in Los Angeles three years ago awarded $300,000 and $651,000 to the survivors of two passengers killed on a flight between Hong Kong and Bali, Indonesia. That case is now on appeal.

Mr. Brennan was also quoted as having said that airline insurance rates in 1976 were 25 to 35 percent below what they were in the previous five years and that the rates in 1978 were probably down to 20 percent of the levels five years earlier with no shortage in capacity.

Statistics presented by the CAB during your 1977 hearings tallied with Mr. Brennan's figures. The Board witness testified that average insurance costs were roughly 20 cents per thousand revenue passenger miles, thus making the cost of insurance on a 13,500 round trip flight between New York and Tokyo $5.13, which is roughly 0.4 percent of the $1354 roundtrip coach fare in 1976.[5]

There are serious issues which should be thoroughly explored and resolved before the Senate approves these Protocols, and ACAP believes that the best forum in which to do so is an evidentiary hearing before the CAB.

One other point should be examined and that is the potential anti-competitive impact of an agreement between a large number of airlines and the largest single source of credit for U.S. carriers. As ACAP understands it, Prudential holds almost ten percent of total truck indebtedness in this country, and the agreement offers the prospect of substantial profits with only minimal risk to Prudential. In addition, the Board's preliminary approval of the SCP focused only on the competitive impact the SCP would have on the personal trip insurance market and ignored the fact that the agreement will effectively eliminate competition for underwriting carrier accident liability exceeding $117,000 (other than for hull loss and non-covered passengers). These issues have not been adequately addressed by the Board, and they should be addressed before this Committee recommends approval of the Protocols to the full Senate.

To sum up, ACAP does not believe that the proponents of the Montreal Protocols have adequately explained or assured that the radical changes which would take place under the new system will protect international passengers and their families as well as (if not better than) the current system. If the Senate is going to limit the liability of airlines in this fashion, it should, at a minimum, guarantee that it establishes a remedy which provides adequate compensation when passengers are killed or injured in a plane crash. Thank you.

Senator **KASSEBAUM**. Thank you, Mr. Hitchcock.

Mr. Ferguson?

STATEMENT OF ALAN N. FERGUSON, VICE PRESIDENT AND ACTUARY, THE PRUDENTIAL INSURANCE CO. OF AMERICA, NEWARK, N.J.

Mr. **FERGUSON**. Thank you, Madam Chairman.

I am an actuary with The Prudential and I testified before the Senate Foreign Relations Committee in 1977. I think it is very unusual for an actuary to appear before the Senate Foreign Relations Committee. It is even more unusual for an actuary to appear twice before the Senate Foreign Relations Committee. We deal in probabilities and I would say that probabilities of that are 100 percent that no other actuary has appeared twice before this committee. [Laughter.]

I would like to briefly make some comments on the supplemental plan. The written testimony that I am tendering is the same that I gave in 1977.

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[5] The CAB witness did add that according to a 1969 study the average cost of insurance for foreign airlines was 1.6 times the cost of that available to U.S. airlines. A 1976 Journal of Commerce Study, however, found overcapacity of liability insurance in U.S. and European markets and noted that rates then dropped to 25 percent of the 1969 level. In light of this overall drop in insurance premiums during the 1970s, as well as a general downward trend in aviation fatalities over the last decade, one might expect that the cost of insurance to foreign carriers dropped and that the gap between their premiums and those paid by U.S. airlines has diminished.

Just briefly on the plan: We have agreed to operate the plan to provide up to $200,000 for benefits for deaths and injuries and also an unlimited amount of medical payments. The initial surcharge is set at $2. That amount is to pay the benefits and the expenses, and also to help build up a fund. The idea of a fund is to provide a cushion for future disasters, and the target set for that fund is $5 times the number of passengers leaving the United States each year.

Should the fund be insufficient at any time to pay whatever claims are due, the Prudential would advance money to the fund, which would be recouped out of future surcharges. It is important to note that the amount of the surcharge is adustable. It is built into the agreement that if the amount of the fund goes below a certain level then the surcharge can be increased. If it appears that the experience is good, the amount of the surcharge could be reduced.

The initial amount of the surcharge, the initial $2 charge, was set in the early 1970's. We have reviewed subsequent experience and we conclude that the $2 surcharge is still reasonable. Over the last few years the number of incidents involving death or injury in international air travel to American citizens has been about 1 for every 80,000 departures from the United States.

We believe, based on the figures that we have, that about 80 percent of the number of claims that would be paid would exceed the threshold of about $125,000 and that the average payment in excess of that amount, which would come from the fund, would be about $160,000. Now, these data produce a raw cost of $1.60 for the surcharge, just to pay those benefits. To cover the expenses, to build up the fund, which I referred to, and also to pay for the unlimited medical expense, we feel that the surcharge has to be higher than that amount and therefore $2 is a reasonable initial charge.

I would like to emphasize that the Prudential is asserting no monopoly on this plan. We are willing to share in its operation with other insurers should they wish to participate. The Prudential in fact regards the operation of this plan as a sort of public service and not a profitmaking endeavor.

The figures show that at least 93 percent of the moneys collected would be returned in the form of benefits. That is a higher return than applies to the insurance which can be purchased by airlines to cover their liability. We participate in insurance plans of that sort and we know for a fact that the expense charges are higher than those which are implicit in our charge.

Mr. Konigsberg referred to the lack of any written material that would argue in favor of the level of surcharge that we have suggested, and referred to statements made by Mr. Brennan of the U.S. Aviation Underwriters. In 1978 I wrote a letter to Senators Pearson and Stone, who had written to their fellow members on the Senate Foreign Relations Committee, in which they had questioned the level of the surcharges. I would like to offer you a letter which I wrote to the two Senators with comments on the basis on which we had developed our surcharge.

It is undeniably true, or unfortunately true, that the number of accidents or the rate of accidents involved in international travel is much, much higher than that which applies to domestic travel. Depending upon which period you choose over the last few years, it is anywhere from 6 to 10 times as high. That is one reason why the surcharge may seem high in comparison to some of the figures which Mr. Konigsberg has quoted.

The Prudential responded to a request by the Government back in the early 1970's to develop a supplemental compensation plan. We, as far as I know, were the only ones who made a satisfactory response. If indeed there is sufficient evidence to show that the amount of the surcharge that we have suggested is too high, or indeed the amount of the liability should be increased, we would be ready to make whatever adjustments are necessary in the plan. Alternatively, of course, the plan could be readvertised to see if other insurers or entities would be interested in operating the plan.

At this point I think there is sufficient evidence for us to be satisfied that the $2 surcharge is a reasonable one.

[Mr. Ferguson's prepared statement follows:]

PREPARED STATEMENT OF ALAN N. FERGUSON

MONTREAL PROTOCOLS TO WARSAW CONVENTION

Gentlemen, my name is Alan Ferguson and I am a Vice President of the Prudential Insurance Company of America. I would like to offer a brief description of the operations of the proposed Supplemental Compensation Plan which would be an integral part of the new system contemplated by the Montreal Protocol Number 3. The Prudential has agreed to administer the Plan should the Protocol come into effect.

The Plan provides up to $200,000 of additional compensation as Basic Benefits if a claimant's losses exceed an airline's limit of liability for death or injury in international aviation. There is a limit on this additional compensation of $100 million for all persons involved in a single accident.

The Plan also pays, without limit as to amount, for medical expenses resulting from an accident which are not reimbursed either by the airline or as Basic Benefits.

The Plan will be funded by means of a surcharge on all airline tickets sold in the United States involving a flight to a foreign country. Everyone paying the surcharge will be covered. In addition, the Plan covers all permanent residents of the United States whenever they are subject to the Protocol, whether or not they have paid the surcharge. This means that a permanent resident of the United States who buys a ticket abroad will not pay the surcharge but will nevertheless be covered by the Plan.

The surcharge is set initially at a level of $2. The airline will collect the surcharges and forward them to the Prudential. After the Prudential has paid the required premium taxes, the balance will be split with about 91 percent going into a Supplemental Compensation Fund. This Fund will be kept separate from Prudential's own assets and invested by the Prudential for the benefit of the Plan. From this special Fund the Prudential will pay 95 percent of any claims.

The remaining 9 percent of the surcharge income after premium taxes will be credited to the Prudential's own accounts. From this the Prudential will pay the other 5 percent of the claims and the administrative costs of running the Plan. Any balance is for undertaking the risks involved and for guaranteeing to advance money to the Fund if the amount in the Fund is insufficient to pay claims. For example, if there should be an aviation disaster shortly after the Plan becomes effective and there is not enough in the Fund to pay the claims, the Prudential will advance sufficient monies to the Fund to make up any deficiency. Any such advances made by the Prudential will be repaid with interest out of future surcharges.

Among the features of the Plan which are very important to the Prudential are provisions for the reimbursement of any advances to the Fund should the Plan be terminated for any reason. If the Plan is terminated at a time when there are advances owing to the Prudential, there is provision for an extended runoff period during which surcharges will be continued until the Prudential is fully reimbursed. During this runoff period, the benefits payable by the Plan would be subject to the direction of the Civil Aeronautics Board.

If the Plan is terminated while the Fund has a positive balance, this balance will be disposed of as directed by the Congress.

The Prudential believes that it has the capability of administering this Plan effectively and doing so at a reasonable price. This is evidenced by the various computer simulations which we have made of the plan's operation.

It is, of course, impossible to predict with certainty the number of passengers who may be killed or injured in international air transportation. We have made a series of computer simulations with various numbers of accidents and amounts of claims. The results of these simulations show that approximately 93 percent of the surcharges collected are returned in the form of benefits to passengers. This is, I believe, a very high rate of return. It is, in fact, more than the 90 percent return which the government stated as a requirement when seeking contractors to administer the Plan.

As I stated earlier, the initial surcharge for the Supplemental Plan is set at $2. This amount is based on recent data developed from the Civil Aeronautics Board and other government sources. Not more often than every two years, the amount of the surcharge may be adjusted—the adjustment, if any, being based on the experience of the Plan. With lower claims than anticipated, the surcharge will be reduced; with higher claims than anticipated, the surcharge will be increased.

One of the objectives of the Plan is to build up, within a reasonable period, a Fund surplus in a dollar amount equal to five times the annual number of tickets for international air transportation sold in the United States. The reason for the build up is to have a reserve to cushion the effect of possible future losses and to minimize the need for drastic increases in the surcharge level in the future.

Each year a full accounting of the Plan's operations would be submitted to the Civil Aeronautics Board for their review—including any redetermination of the surcharge.

One of the questions which has been asked about the operation of the Plan is how does it compare with other insurance plans; for example, with regular airline liability insurance and also with the airline trip insurance which passengers can purchase at airports.

Airline liability insurance pays claims for passenger liabilities. The rates for the insurance vary according to the airline involved. The cost to the passenger for airline liability insurance is not an identifiable surcharge but is nevertheless part of the fare structure. It is from the fares that the airline derives revenues to pay the liability insurance premiums. Comparison with the operation of the Supplemental Compensation Plan is difficult but I believe that it can be stated with confidence that the return to the passenger is better in the proposed Plan than it is in regular liability insurance plans.

Although the Prudential does not sell airline liability insurance directly, we are involved indirectly. We participate with seven other life insurance companies in a group known as the Extended Reinsurance Group which provides reinsurance for aircraft and passenger liability risks. The overall expense rate for the Group which has a premium income of about $17 million annually is about 12 percent of premium. The expenses cover commissions to brokers, expenses of administration and premium taxes. In addition, the Group expects to earn a profit and also derives substantial investment income from the reserves held to cover claims which have been incurred but not yet paid.

In the Supplemental Compensation Plan there are no commissions and the investment income accrues almost totally to the Fund and not to the Prudential. Also, any profits to the Prudential will be only on 9 percent of the surcharges after premium taxes have been paid less the costs of administration and less the 5 percent of claims for which Prudential is liable.

Comparison with airline trip insurance (the kind that is bought in airports) is even more difficult. This insurance is for fixed amounts. It does not depend on the amount of loss suffered by a passenger but merely on the amount the passenger decides to purchase at the airport.

The Prudential does not sell this type of insurance and I do not know the proportion of the premium which is returned in the form of benefits. However, I believe that the expenses of running this type of operation are much higher as a percentage of premium than will be the case for the Supplemental Compensation Plan. The insurers who sell this type of coverage have the expense of the booths which are operated in airports where the plan is sold and I understand that the commission payable to the airports is at least 25 percent of the premiums.

Many of the details of the Supplemental Compensation Plan are included in material which the airline parties to the agreement have filed with the Civil Aeronautics Board and which have been submitted to this committee. This material includes a description of the assumptions made in deriving the $2 surcharge, copies of the computer simulations and a description of the operation of the Fund.

I would like to submit copies of the proposed wording for a 'Notice to Passengers' which would be included with each airline ticket. The Notice describes the airline's limit of liability under the Protocol and the benefits available under the Supplemental Compensation Plan. I am also submitting copies of a letter which would be sent to claimants advising them of their rights under the Plan and a more detailed description of the Plan which would be furnished to anyone who made inquiries.

Thank you for the opportunity of making these comments on behalf of the Prudential. If you have any questions, I will be very pleased to try to answer them.

ATTACHMENT I

NOTICE TO PASSENGERS

If your ticket includes any foreign travel, a treaty known as "Montreal Protocol No. 3" may apply to your entire journey. This treaty limits an air carrier's liability for damage suffered as a result of your accidental death or personal injury while on board the aircraft or embarking or disembarking.

The limit of the air carrier's liability is approximately $117,000. However, for travel sold and originating in the U.S.A., there is a "Supplemental Compensation Plan" which pays up to an additional $200,000 if damages exceed the air carrier's limit. Additional payment for most medical expenses may also be made by the Plan without limit as to amount. The price of your ticket, if purchased in the U.S.A., includes a separate charge to pay for the Plan.

The amount of any payments from the air carrier and the Plan may not exceed the monetary value of the damages suffered; and the Plan pays only if damages are greater than the air carrier's $117,000 limit. If you wish to have travel accident insurance which automatically pays fixed amounts regardless of the amount of damages, you should purchase if from a private insurance company. Payments from such insurance will not affect any amounts payable by the carrier or the Plan.

ATTACHMENT II

(PRUDENTIAL LETTERHEAD)

Dear: We have been informed by (name of carrier) that a claim has been (may be) made against it in connection with [the death of (injury to) (name of passenger)] (your injury) on (date of incident). This is to advise you that if (name of carrier)'s liability for damages is limited by a treaty known as "Montreal Protocol No. 3" or by any applicable national law, and the monetary value of the loss exceeds the limit, additional benefits may be payable under a "Supplemental Compensation Plan" to which (name of carrier) is a party. The Prudential is responsible for administering the Plan, a description of which is contained in the enclosed pamphlet.

Under the terms of the treaty, the limit of liability of (name of carrier) for losses in respect of each passenger is approximately $117,000. The Plan will pay up to an additional $200,000 for losses in excess of this amount. Additional payments for most medical expenses may also be made by the Plan without limit as to amount. Please note that compensation under the Plan is not affected by any benefits that may be payable under any other individual or group policy of insurance.

To file a claim for benefits, please complete and return the enclosed form. A self-addressed, prepaid envelope is provided for your convenience. In determining benefits which may be payable under the Plan, Prudential will have access to any proofs of loss submitted to (name of carrier). If anything further is required to enable us to properly evaluate a claim, we will request it directly. Prudential will act on any claim within sixty days after (name of carrier) has agreed to pay, or has been declared by a court of law to be obligated to pay, losses to the full extent of its liability under the treaty or any applicable national law.

If you have any questions about the Plan, please call or write. [In addition, you may wish to seek the advice of an attorney.]

Sincerely,

ATTACHMENT III

AGREEMENT TO ESTABLISH SUPPLEMENTAL COMPENSATION PLAN PURSUANT TO ARTICLE 35A OF THE WARSAW CONVENTION AS AMENDED AT THE HAGUE, 1955, AT GUATEMALA CITY, 1971 AND BY THE ADDITIONAL PROTOCOL NO. 3 OF MONTREAL, 1975

This pamphlet describes in general terms the benefits that may be available for passengers who are killed or injured in international air transportation. These benefits are provided by a Plan specified in the "Agreement to Establish Supplemental Compensation Plan Pursuant to Article 35A of the Warsaw Convention as Amended at the Hague, 1955, at Guatemala City, 1971, and by the Additional Protocol No. 3 of Montreal, 1975." All benefits are subject to the facts of the particular case and to the terms of the Agreement.

"MONTREAL PROTOCOL NO. 3"

Passengers on a journey by air involving an ultimate designation or a stop in a country other than the country of origin may be subject to the provisions of a treaty known as the "Warsaw Convention as Amended at the Hague, 1955, at Guatemala City, 1971, and by the Additional Protocol No. 3 of Montreal, 1975" during the entire journey. In general, the treaty (which is commonly known as "Montreal Protocol No. 3") imposes liability on the air carrier for civil damages if the death or personal injury of a passenger is caused by an event that takes place "on board the aircraft or in the course of any of the operations of embarking or disembarking" unless it results "solely from the state of health of the passenger."

Carrier liability for damages is limited by the treaty to, in most cases, 100,000 "Special Drawing Rights" as defined by the International Monetary Fund. As of   this was equivalent to $. The dollar value may be obtained on request to the Office of Supplemental Compensation—Montreal Protocol No. 3 at the address specified below.

Even if Montreal Protocol No. 3 does not apply to an international journey, the law of the country in which a legal action for damages may be brought (based upon the alleged negligence of the air carrier) may limit the amount of the recovery.

THE SUPPLEMENTAL COMPENSATION PLAN

Article 35A of the treaty permits any country which has ratified the treaty to establish a system which supplements the carrier's liability. The United States has ratified the treaty and a "Supplemental Compensation Plan" has been established by mandate of the Federal government to provide compensation for damages in excess of the treaty limit whenever such compensation is limited by the treaty or by any applicable national law. This Supplemental Compensation Plan is funded by collection of a Plan Surcharge for every international journey by air sold in and departing from the U.S.A. The Plan is administered by the Prudential Insurance Company of America through its Office of Supplemental Compensation—Montreal Protocol No. 3.

WHO IS COVERED UNDER THE PLAN

Any passenger on an international journey whose death or personal injury is caused by an accident that takes place while onboard the aircraft or in the course of any of the operations of embarking or disembarking is covered under the Plan:

(1) If the flight was subject to the treaty and the passengers had his or her domicile or permanent residence in the United States; or

(2) If the Plan Surcharge was or should have been collected, *i.e.*, the passenger's ticket was sold and the journey originated in the United States.

COMPENSATION PAYABLE

Two types of benefits may be payable under the Plan:

(1) *Basic Benefits.*—If damages exceed the amount of the carrier's treaty liability the Plan will pay up to $200,000 of the excess.

Basic Benefit payments are also subject to the additional limitation that total payments for all claims arising out of a single accident may not exceed $100,000,000.

If medical expenses are not fully reimbursed by the carrier or as Basic Benefits, additional benefits may be payable under the Supplemental Medical Benefits portion of the Plan.

(2) *Supplemental Medical Benefits.*—Eligible medical expenses incurred by or on behalf of a passenger which are not reimbursed either by the carrier or as Basic Benefits will be reimbursed, without limit as to amount, under the Supplemental Medical Benefits portion of the Plan. All reasonable charges for medical services and supplies will be considered "eligible" except charges for services rendered by close relatives.

In determining whether eligible medical expenses are reimbursable as Supplemental Medical Benefits, Prudential will attribute payments by the carrier and by Prudential under the Basic Benfits portion of the Plan to medical expenses only after non-medical damages have been satisfied.

The effect of the payment of Supplemental Medical Benefits is to ensure that all eligible medical expenses incurred by or on behalf of a passenger are reimbursed in full.

Note that no benefits are paya nder the Plan unless the carrier has agreed to pay, or has been declared by a c f law to be obligated to pay, losses to the full extent of its liability under the t r any applicable national law.

CLAIMS

Claims under the Plan must be submitted to the Office of Supplemental Compensation—Montreal Protocol No. 3 at the address specified below. In most cases the carrier will notify the Office when one of its passengers has been killed or injured. In turn, the Office will notify known anticipated claimants of their possible right of recovery under the Plan. However, claims may and should be submitted whether or not any such notice has been received.

The Office will make payments to claimants in accordance with the terms of the Plan not more than sixty (60) days after receiving proof of its obligation to make such payments, provided that the following conditions are met:

(1) Damages are determined to exceed the carrier's liability.

(2) An appropriate release and subrogation agreement is executed.

(3) If requested, a passenger whose injury is the basis of the claim submits to examination, or

If requested and not prohibited by law, an autopsy is permitted where a claim is in respect of the death of a passenger.

TIME LIMIT ON CLAIMS

No benefits are payable under the Plan if the right to recover compensation for damages from the air carrier has expired. Article 29 of Montreal Protocol No. 3 provides that: "The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped."

Other limiting periods may be applicable where the treaty does not apply.

INFORMATION

Further information on the Plan can be obtained from: The Prudential Insurance Company of America, Office of Supplemental Compensation—Montreal Protocol No. 3, 745 Broad Street, Newark, New Jersey 07101.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Newark, N.J., August 3, 1978.

Hon. James B. Pearson, AND HON. RICHARD STONE,
U.S. Senate, New Senate Office Building, Washington, D.C.

GENTLEMEN: I have received a copy of a letter dated June 9, 1978 which you wrote to your colleagues in the Senate on the subject of the Montreal Protocols to the Warsaw Convention. You may recall that in the Foreign Relations Committee hearing on the Protocols which was held last year, I testified on behalf of the Prudential about the Supplemental Compensation Plan. The Prudential has agreed to administer the Supplemental Compensation Plan if it should go into effect. One of the questions raised in your letter concerns the level of the ticket surcharge for the Supplemental Compensation Plan. I would like to comment on this question.

In your letter you quote a statement from Mr. John Brennan, President of the United States Aviation Underwriters, in which he refers to the cost to U.S. airlines for aviation insurance. He states that in 1977 the cost of liability insurance to U.S. airlines was "about 40 cents per passenger per round trip". He contrasts this cost with the cost of the Supplemental Compensation Plan and implies that the proposed $2.00 initial Plan surcharge is excessive.

I believe that it is irrelevant to use the insurance cost for U.S. airlines engaged primarily in domestic flights as a standard for judging the cost of a Plan which applies only to journeys involving international flights including flights on foreign airlines. I also believe that, although the $2.00 initial surcharge was derived several years ago, it is still, based on the statistics available, an appropriate figure. The attached memorandum presents my arguments on these points in detail and includes a description of how the surcharge was derived.

In addition to the comments in the memorandum, I would like to point out that the Plan includes a formula for bringing the surcharge in line with the actual claims paid under the Plan so that if the surcharge has been set at too high a level, it will ~~be~~ reduced. It is also important to note that if the surcharge has been larger than is necessary to pay the claims, the result will be to increase the Supplemental Compensation Fund, thereby benefitting future passengers. This feature is unique in aviation insurance. Finally, as I stated in my testimony to the Foreign Relations Committee, if the expense charges that we have allowed for in the Plan prove to be excessive, we are prepared to make appropriate adjustments.

I apologize for the length of the description in my memorandum of the derivation of the surcharge but it is, I believe, important to demonstrate that the derivation is based on valid statistics from the past and reasonable assumptions about the future. A description of the derivation of the surcharge was given to the Civil Aeronautics Board in February 1977 and interested parties were thereby given the opportunity to comment. To my knowledge there has not been any comment which has shown the derivation to be incorrect or the assumptions invalid.

I am concerned that my presentation may make it appear that the Prudential has some selfish motive in advocating implementation of the Plan. I wish to assure you that this is not the case. Any profit which the Prudential might make from the Plan would be quite modest. The Prudential's participation in this Plan was in response to a request by the Federal government. We believe that we have performed a public service by assisting in the development of a viable Supplemental Compensation Plan. Other interested parties, including Mr. Brennan's company, had the opportunity to offer alternative plans. If better or less expensive alternative plans had been put forth, I assume that one of these plans would have been chosen by the government task force in preference to the Prudential's plan.

We do not believe it is appropriate for the Prudential to take a position on the Protocol itself—this is government policy, and is outside the purview of our operations. However, we are firmly of the belief that the Plan as presently presented does offer a sound and economical basis for a system of compensation to those unfortunate enough to suffer a loss as a result of an airline accident.

If you should have any questions about the material included in the memorandum or any other questions about the Prudential's participation in the Plan, I will be pleased to try to answer them.

Sincerely,

ALAN N. FERGUSON,
Vice President and Actuary.

[Memorandum]

AUGUST 1, 1978.

Subject: Montreal Protocol No. 3, Supplemental Compensation Plan, Initial Surcharge Level.
From: Alan N. Ferguson.

This memorandum discusses the irrelevance of Mr. Brennan's figure of 40 cents for evaluating the cost of the Supplemental Compensation Plan. It also shows how the $2.00 initial surcharge level was derived and why it is still an appropriate figure to use.

1. *Irrelevance of Mr. Brennan's 40 Cent Figure.*—Mr. Brennan's statement about the costs of aviation insurance is limited to those payable by U.S. carriers. It does not take into account the costs for foreign flag carriers which carry a substantial proportion of U.S. international passengers (see the table in Attachment A). Moreover, Mr. Brennan concedes that 90 percent of the flights upon which his costs were based were domestic. Thus, the 40 cent figure he used is not necessarily relevant for the risks involved where all journeys entail international transportation. The following statistics give ample support to the view that the risks involved in international transportation are higher than those in purely domestic transportation.

The table shows the number of enplanements and fatalities on U.S. scheduled airlines for the five year period 1973 through 1977 as reported in "Air Transport 1978", the annual report of the U.S. scheduled airline industry published by the Air Transport Association of America.

U.S. SCHEDULED AIRLINES—1973–77

	Domestic	International
(a) Fatalities	468	[1] 365
(b) Enplanements (millions)	990.3	88.1
(c) Fatalities per million enplanements (a ÷ b)	.473	4.143

[1] Since the data are only for scheduled service, they do not include the 321 fatalities on the Pan American aircraft involved in the Tenerife disaster. It should be noted that the Tenerife accident would have been covered under the Supplemental Compensation Plan.

On a per enplanement basis the table shows a fatality rate for international flights that is over 8 times the rate for domestic flights (4.143 ÷ .473 = 8.76).

The foregoing statistics relate to U.S. Scheduled airlines only. The Plan, however, also includes non-scheduled service and flights on foreign airlines; it is generally recognized that many foreign airlines do not match the safety record of U.S. Scheduled airlines.

Thus, it is evident that the cost and risk factors involved in international air transportation are quite different from those in U.S. domestic air transportation and that a cost figure which may be appropriate for domestic aviation has no relevence to the proposed Plan surcharge.

2. *Derivation of the Initial Supplemental Compensation Plan Surcharge.*—In determining the proper level of the initial surcharge, we did not use insurance costs of domestic or foreign airlines. We used basic statistics on the rates of fatalities and injuries and the amounts of claims which had been paid in recent years. Since the Plan is so radically different from standard insurance plans, the method we used seems the only rational way to proceed.

This section describes the steps and considerations involved in deriving the level of the initial surcharge.

One of the premises of the Plan, described in Section 4.3 of the Agreement, is that for the passengers covered by the Plan the long term average number of deaths and serious injuries is 1 claim per year for each 80,000 passengers. Attachment A to this memo indicates the basis for this assumption.

The statistics in Attachment A (which was also included with a December 31, 1975 filing with the CAB in support of the Supplemental Compensation Agreement) show the frequency of deaths and serious injuries for U.S. citizens on flights covered by the Warsaw Convention. As shown, the frequency for the period 1966 to mid-1973 was 1 claim in 79,000 passengers. Based on these statistics, we used an annual frequency of 1 claim in 80,000 pasengers as a basis for figuring the initial surcharge. This is in fact a lower rate of claim than has been experienced more recently; updated through mid-1977, the long term frequency worsened to about 1 claim per 60,000 passengers, largely because of the Tenerife accident. However, it seems reasonable to assume that airline safety will improve over the long term and the figure of 1 claim per 80,000 passengers still seems appropriate.

In addition to the frequency of claims, the other major factor in setting the initial surcharge is the anticipated average claim amount. This is difficult to estimate because no information is available on what the amounts of settlements would have been for Warsaw cases had the limits of liability been higher. However, data on the unlimited liability settlements for non-Warsaw cases are available and it seems reasonable to use these data as guides.

As I explained in my statement attached to a February 20, 1976 submission to the Civil Aeronautics Board, such data have been developed by the CAB in studies which show the distribution of settlements by amount. The first such study covered settelments made during the period 1966 through 1970 for claims incurred in the period 1960 through 1969.[1] The second study covered settlements made through mid-1974.[2]

The data in the CAB studies show the number of non-Warsaw settlements which exceed certain dollar levels—i.e., more than $1,000, $10,000, $50,000, $75,000,

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[1] Civil Aeronautics Board, Levels of Recoveries on Account of Passenger Deaths and Serious Injuries in Airplane Accidents (Covering settlements with respect to aircraft accidents occurring in the calendar years 1960 through 1969).

[2] Levels of Recoveries on Account of Passenger Deaths and Serious Injuries in Airplane Accidents, 1974 Study (Dated January 1, 1975).

$100,000, $125,000 and so on. The threshold for claims against the proposed Supplemental Compensation Plan is currently about $124,000—based on the current level of Special Drawing Rights (SDR's). It is therefore reasonable to consider the claims in the CAB studies which are in excess of $125,000 (the nearest dollar amount in the study) as an indication of what experience may be expected under the Supplemental Compensation Plan.

The proportion of non-Warsaw claims which exceeded $125,000 for the years 1966 through 1969 was 26 percent. The proportion which exceeded $125,000 for the years 1970 through mid-1974 was 33 percent and for the last 18 months of this period was 39 percent. It seems reasonable to assume, because of inflation and the effect of easier settlements under the Supplemental Compensation Plan, that the proportion will continue to increase with time and for the first few years of the Plan's operation may be expected to be in the 60–70 percent range.

The amount of the average non-Warsaw claim in excess of $125,000 may also be determined from the CAB data. By limiting to $200,000 the amount by which such claims exceed $125,000, an estimate can be made of the average claim which would have been made if the Supplemental Compensation Plan had been in effect. For the years 1966 through 1969, the average settlement against the Plan would have been about $110,000. For the years 1970 through mid-1974 the average settlement would have been about $130,000 and for the last 18 months of this period would have been about $140,000.

Considering the trend of these figures and the inflationary and ease of settlement factors noted above, it seems reasonable to estimate that the average claim against the Plan during the first few years of its operation will be $160,000 to $180,000.

By combining the proportion of claims which may be expected to be made against the Plan with the average amount of such claims, the range of average claim to be expected in the first few years of the Plan can be derived. The range is $96,000 (60 percent of $160,000) to $126,000 (70 percent of $180,000). This is the average claim related to the total number of claims—i.e., to the estimated frequency of 1 claim in 80,000 passengers.

The amount of the surcharge may then be calculated as follows: Surcharge equals (Average Claim by Claim Frequency) divided by 0.93.

The 0.93 factor is the proportion of the surcharge which remains after the approximate 7 percent deduction for taxes, administrative expenses and risk bearing charges. I stated in my testimony before the Senate Foreign Relations Committee that, based upon Prudential's experience with aviation reinsurance, the 7 percent level of "retention" compares very favorably with industry practice. I am not aware of any aviation insurance program that has as low a cost factor.

The result of applying this formula is that for an average claim of $96,000, the surcharge is $1.29 and for an average claim of $126,000, the surcharge is $1.69. Based on these figures it appears that the initial surcharge could be set at about $1.50. The surcharge selected was, however, $2.00. There are a number of reasons why the higher figure was selected.

One reason relates to be building up of a Plan Fund balance. A premise of the Plan described in Section 4.3 of the Agreement is that the net balance of the "Supplemental Compensation Fund" (described in Section 2.3 of the Agreement) should over the long term be approximately $5.00 times the annual number of Plan surcharges collected. The purpose of maintaining such a balance is to enable the Fund to absorb the effects of an airline disaster and so avoid the need for drastic increases in the surcharge. It requires that the surcharge be greater than the amounts required merely to pay claims as calculated above; an additional amount must be charged in order to build up the Fund balance. Incidentally, any balance in the Fund earns interest thereby increasing the Fund and benefitting future passengers.

Another reason for selecting the initial $2.00 level of the surcharge is to allow for the payment of Supplemental Medical Benefits for which provision is made in Paragraph 3.5 of the Agreement. These benefits are in addition to the basic benefits paid by the Plan.

Allowance must be made for the fact that domiciliaries and permanent residents of the United States are covered under the Plan on all transportation subject to the Protocol whether their ticket is subject to the surcharge or not. (Only tickets purchased in the U.S. will include the surcharge.)

Thus, considering all the factors involved, an initial surcharge of $2.00 is reasonable. It must, however, be conceded that no one can be certain as to future accident occurrences. For this reason, Section 4.2 of the Agreement includes an automatic adjustment formula to make certain that once the Plan is in operation, the level of the surcharge will reflect actual experience. Whatever claims are paid by the Plan will affect the level of the future surcharge. Thus, if the claim costs are less than those assumed, the surcharge will be reduced in accordance with the formula.

ALAN N. FERGUSON,
Vice President and Actuary.

Attachment A

U.S. Citizen Departures

	U.S. Passengers* to & from Canada (1)	1/2 of Column (1) (2)	Citizen Departures** by U.S. Carriers (3)	Citizen Departures** by Foreign Carriers (4)	Total Ticket (2)+(3)+(4) (5)
1966	1,100,000	550,000	1,911,663	1,345,898	3,807,561
1967	1,170,000	585,000	2,335,613	1,484,160	4,404,773
1968	1,310,000	655,000	2,747,694	1,555,720	4,958,414
1969	1,530,000	765,000	3,157,585	1,940,063	5,862,648
1970	1,590,000	795,000	3,557,405	2,261,094	6,613,499
1971	1,640,000	820,000	3,971,972	2,357,157	7,149,129
1972	1,750,000	875,000	4,624,140	2,953,202	8,452,342
Total 1966-72					41,248,366
1973	1,990,000	995,000	5,267,000	3,476,000	9,738,000
7/12 of 1973					5,680,500
Total 1966-July 1973					46,928,866

Years 1968-1972 furnished by CAB as derived from Canadian Air Transport Board figures for total U.S./Canada traffic. Other years estimated on the basis of simple linear progression (and regression).

Taken from Immigration and Naturalization Service records, 1968 to 1972.

Deaths and Injuries

Outside U.S. - Data derived from annual accident report of the U.K. Air Registration Board and reports of deaths to U.S. citizens from Department of State, U.S. Consular report.	490
Pan Am Crash in Tahiti - July 1973	33
Estimated Guatemala Deaths Inside U.S.	12
Total	535
Injuries Estimated to be 11% of Fatalities	59
Total	594

Involvement Rate: 46,928,866 ÷ 594 = 1 per 79,005 tickets

SURCHARGE FLEXIBILITY

Senator **Kassebaum**. Thank you.

I would like to ask you, on that surcharge flexibility, when you said it could be increased or reduced, who makes that determination? Does the CAB make it as it is set up now? Does it make a determination as to whether that is adequate or fair, or is that a determination that you make?

Mr. **Ferguson**. It is built into the agreement. There are automatic provisions for changing the surcharge, to be made not more often than once every 2 years. So initially it would be $2 for 2 years. Then after that period it would be raised or lowered, depending upon what the experience was.

When I said that the amount could be adjusted from the outset, if there is evidence to show that at this point $2 is not a proper level, then we certainly would be glad to look at that evidence and see if it would be appropriate to make any change.

Senator **Kassebaum**. Mr. Hitchcock, do you have a comment?

Mr. **Hitchcock**. Yes, Senator. The question came up during the last round of hearings. I think the evidence, based on conservative assumptions, was that the surcharge might go as high as $4.50 per ticket, and under different assumptions it might go as high as $9 on the high side. I forget, I think the low side of the figure was 50 cents a ticket.

Mr. **Ferguson**. The work we did, Senator, in reviewing the operation of the suggested plan was to make a number of simulations. This was analogous to flipping a coin and to determine how many accidents there might be. If the experience was very bad I think $6 was about the highest surcharge we developed for a limit of $200,000 and 50 cents was as low as it ever got.

But in practice, the amount of the surcharge would be dependent totally on what the experience was.

Senator **Kassebaum**. And again, determined by whom?

Mr. **Ferguson**. By the agreement itself, the agreement between The Prudential and the carriers which have signed it, subject to the approval of the CAB.

Mr. **Landry**. Madam Chairman, I would like to add that that is an agreement under Section 412 of the Federal Aviation Act, which currently is subject to the review of the Civil Aeronautics Board and which, as the chairman well knows, as an agreement affecting foreign air transportation, is likely to be subject to review by the Department of Transportation in the future.

Senator **Kassebaum**. I am sorry that we are under such time constraints as we are this morning.

Mr. Ferguson, I would like to return to you for a moment. If the protocol would not be approved, do you have any other suggestions for a low-cost system that would be of benefit to international air passengers?

Mr. **Ferguson**. I do not know of any system which would offer the benefits of speed of settlement or economy of settlement. Settlements can be made much more quickly under the plan and the time value of money is important—only half of the cases involved the American Airlines crash in Chicago have been settled after two years. There should also be considerable reductions in lawyers' fees.

IMPORTANCE TO AIRLINES

Senator KASSEBAUM. Mr. Landry, how important is that to the airlines? I know that certainly there has been not only your testimony, but an expression of great interest on the part of the airlines that there be a speedy passage and ratification of the protocols, that this is not only causing problems for us internationally, but with some uncertainty in the position of the carriers.

Would our failure to act favorably enhance the position of foreign carriers in any way? What position might it put our own domestic carriers in?

Mr. LANDRY. I would not say that it would enhance the position of foreign carriers, but I would say that the international community, both governments and airlines, are constantly badgering U.S. delegations and U.S. representatives in international negotiations and meetings. I have had the privilege of serving on some U.S. delegations, and they are constantly asking: "Where is the United States, that was their baby, this was something the U.S. jammed down our throats."

When we started this mission back in 1970, only the United States and the Philippines wanted to go as high as $100,000. We are now at $325,000. I might add that the committee has before it a couple of surveys which bring the accident experience up to date.

Back in the original hearings you had the CAB survey, which indicated that 84 percent of the victims in domestic cases would have been satisfied by $317,000. In the spring of 1980, the Assistant Secretary of State wrote to Senator Biden and indicated that 90 percent of the cases had been settled in non-Warsaw cases from 1965 up to 1978 at below $320,000; from 1974 to 1978, 86 percent.

In our testimony today we have given you the results of the crashes involving TWA at Mount Weather approaching Dulles Airport, Southern Airlines in Atlanta, PSA in San Diego, Pan American at Tenarife, and American in the DC-10. And the composite of those reveal that 85.8 percent of the victims, the settlements and the judgments would be covered by $325,000.

This is something that is going to take care of all of the people that Mr. Hitchcock traditionally represents. It will only leave out the wealthy.

DIFFERENCE BETWEEN FOREIGN AND DOMESTIC CARRIERS

Mr. HITCHCOCK. I have just one additional word on that. The difference between foreign and domestic carriers is this. There are a number of cases tried in the United States involving foreign carriers, even when the travel is not between two points in the United States. You may recall an accident in which there was a plane traveling from Rio to Paris in 1973. It was a Varig plane. I do not believe any people on board were American citizens, but one did have an American dependent. Suit was brought in New York City.

I think the aircraft hijacked to Entebbe in 1976, when the Israeli commando raid freed the passengers, had litigation in Chicago involving that. So there are a number of cases in America regarding foreign airlines. There may be American passengers on board or American dependents. A number of those cases are tried in the United States under the same rules that would be applicable.

Senator **Kassebaum**. Would you advocate withdrawing completely from the Warsaw system, Mr. Hitchcock, or to try to work for higher limits?

Mr. **Hitchcock**. You currently have before you the proposal of $325,000. I think our recommendation at this stage is, let us see if that is adequate or not. You know, there was a mention of an extra $30,000 or so and there might be a modification of $200,000. I think the important point is you have a number before you and it is just uncertain how accurate that really is.

Senator **Kassebaum**. I think we would all agree that there is never a limit that would really be sufficient for the loss of a human life. So in trying to devise something that will be fair and will be as efficient as we can make it, I think it is in the interest of us all.

I certainly do appreciate the testimony that you gave us this morning. Thank you all very much.

I have three letters, from the Aerospace Industries Association of America, International Air Transport Association, and Air Florida, that I would like to make a matter for the record.

[The letters referred to follow:]

Aerospace Industries Association of America, Inc.,
Washington, D.C., June 4, 1981.

Mr. Frederick S. Tipson,
Chief Counsel, Committee on Foreign Relations,
U.S. Senate, Washington, D.C.

Dear Mr. Tipson: This is in response to your letter of June 3, 1981, inquiring as to the position of the Aerospace Industries Association on Senate ratification of Montreal Protocols 3 and 4 to the Warsaw Convention.

On July 26, 1977, in our testimony before the Senate Foreign Relations Committee, we urged the Senate to consent to United States adherence to the Protocols, but only for a limited period of five years.

We now withdraw our proposal for limiting United states adherence to the Protocols to five years. We have no objection to ratification on Montreal Protocols 3 and 4 without any reservation or other limitation.

In view of the foregoing, we see no need for further testimony from this industry at this time.

Yours very truly,

Karl G. Harr, Jr.

International Air Transport Association,
Montreal/Geneva, September 7, 1981.

Senator Charles H. Percy,
Chairman, Senate Committee on Foreign Relations,
U.S. Senate, Washington, D.C.

Dear Senator Percy: On 27 July 1977 IATA was privileged to testify before the U.S. Senate Committee on Foreign Relations in favour of early U.S. ratification of Montreal Prótocols 3 and 4 designed to modernise the Provisions of the Warsaw Convention of 1929. Consideration of this important matter is unfortunately still pending.

It has long been recognised that the 1929 Warsaw Convention has become obsolete. Air carrier liability in international air transportation is still, nonetheless, largely governed by this instrument. The Protocols adopted in Montreal in 1975 constitute a highly desirable and overdue measure of international law reform incorporating significant improvements to the original Warsaw concept.

IATA strongly supports ratification of Montreal Protocol No. 3 as it would:

(1) Provide for more realistic carrier liability limits;

(2) End the multiplicity of liability regimes which currently discriminate between passengers;

(3) Benefit passengers by the imposition of strict liability on carriers;

(4) Encourage speedy settlement of claims without recourse to litigation thereby undermining the practice of "forum shopping"; reduction in exposure to litigation would ultimately be reflected in insurance premiums;

(5) Provide full compensation for majority of claimants particularly where accompanied by U.S. Supplemental Compensation Plan;

(6) Protect carriers from catastrophic loss by ensuring that liability limits are unbreakable thereby also limiting the present exposure to ritual allegations of wilful misconduct and claims for punitive or exemplary damages;

(7) Reduce the need for governmental pressures to increase liability limits by contract since the Protocol itself contains Provisions for adjusting liability limits to take account of inflation;

(8) Resolve the uncertainties concerning conversion of the Poincaré Franc into local currencies;

(9) Simplify ticketing and notice procedures thereby facilitating computerisation of airline procedures; and

(10) Facilitate the exchange between carriers of technical and safety information in the interests of accident prevention.

Montreal Protocol No. 4 updates and modernises Provisions of the Warsaw Convention and reflects the current requirements of international commerce. The progress achieved in Montreal with respect to simplification of documents will permit less costly, speedier and better controlled flow of air cargo for the benefit of the air shippers and of the public. I would also like to stress the benefits deriving from uniformity in the law with standardised Provisions relating to such matters as stoppage in transit notice limitation of action and choice of forum. It is in the general interest that there should be certainty in these matters instead of the diversity of Provisions that would govern in the absence of a Convention.

For all these reasons may I urge your Committee to resume as a matter of urgency consideration of Montreal Protocols 3 and 4 and give its consent to U.S. ratification of these instruments.

In addition to these considerations, it would be particularly appropriate for the U.S. Government to ratify the agreements without further delay because it was the U.S. Government which took the initiative in pressing for modernisation of the Warsaw Convention and because many other countries have been looking to the U.S. Government to act before they do. The consent of the Senate to ratification would be a major step toward worldwide adoption of the agreements.

Yours sincerely,

KNUT HAMMARSKJÖLD.

AIR FLORIDA,
Washington, D.C., September 28, 1981.

Hon. CHARLES PERCY,
Dirksen Senate Office Building,
Washington, D.C.

DEAR SENATOR PERCY: Air Florida wishes to express its strong support of Montreal Protocol 3 and urges you to promptly offer your advice and consent to its ratification.

This agreement, otherwise known as the Guatemala Protocol, concerns airline liability in the cases of death or injury and represents U.S. efforts to modernize the terms of the 1929 Warsaw Convention.

The purpose of the Convention and its subsequent amendments, or Protocols, is to provide a uniform, international legal regime to ensure liability limits which are equitable and adequate. This agreement was necessary to protect international travelers from the uncertain and varied entitlements established by foreign governments and from the extremely low limits on recovery enforced by many countries.

For some time, the United States has endeavored to raise the limits considerably in order to comply with the needs of U.S. citizens. When no agreement could be reached, the U.S. filed a notice denouncing the Warsaw Convention in 1965. This action served as a catalyst to the adoption of a carrier agreement known as the Montreal agreement which convinced the U.S. to withdraw its denunciation. It was understood that this agreement, which sets the limit of liability at $75,000 and waives all air carrier defenses available under the Convention, would be only a temporary solution to U.S. dissatisfaction.

In an effort to formulate a final revision of the Treaty, the U.S. considered provisions for certainty of recovery, speedy recovery and adequate recovery. This endeavor culminated in the Guatemala Protocol which is now ready for signature. Air Florida endorses this agreement because it provides:

(1) An unbreakable airline liability limit of 100,000 Special Drawing Rights (SDRs are an average of daily currency values for several countries) which is approximately $125,000, regardless of fault;

(2) A settlement inducement clause designed to force airlines to settle claims within six months by subjecting them to added costs (including attorney's fees) if in a subsequent trial a court awards more than the airlines offer;

(3) Facilitation of suits against foreign airlines in the U.S. by permitting an action in the domicile of the passenger if the airline has an establishment there; and

(4) Recognition of the right of each participating nation to establish a supplemental compensation plan to operate within its territories.

These terms represent improvements in the system because the claimant is guaranteed recovery without arguing fault; an overall limit of $320,000 (including supplemental) is provided in addition to medical benefits; and recovery will be limited to six months at most with less cost to parties involved since fault or "willful misconduct" will not be an issue.

These are the specific reasons that warrant your support of this agreement. In general, your approval is urged because without an agreement the United States appears less committed to its leadership role in the international community which has cooperated with the United States believing that we would ratify the treaty we once demanded other countries to accept.

In summary, your support of Montreal Protocol 3 is imperative if the United States is to preserve its leadership role, protect its citizens and practice sound aviation policy. Please support Montreal Protocol 3.

Cordially,

SANDY MITCHELL,
Vice-President, Government Affairs.

Senator KASSEBAUM. Thank you very much. This committee is adjourned.

[Whereupon, at 11:05 a.m., the committee adjourned, subject to call of the Chair.]

APPENDIX

UNITED STATES SENATE,
Washington, D.C., June 9, 1978.

DEAR COLLEAGUE: The Senate Foreign Relations Committee has before it for consideration the Montreal Protocols (Nos. 3 and 4 of 1975, incorporating the Guatemala City Protocol of 1971) to the Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw on October 12, 1929, and adhered to by the United States on July 31, 1934, subject to reservation).

On two occasions this year, we have requested the Committee to defer action on this matter until the Committee was in a position to devote serious attention to the Protocols. It has been our belief that the Panama Canal Treaties and other priority Committee business have made this impossible to date. We indicated that the impact of the Protocols on the legal rights of consumers and the liabilities of air carriers and aerospace manufacturers were profound and novel. It is our view that the far-reaching effects of the Protocols on the international rules for recovery for the injury or death of passengers in airline accident cases require considerable Committee study as to the details of the Protocols.

The purpose of this letter is to provide a beginning point for further consideration of the Protocols. We would hope that the Committee would schedule a discussion period for the issues set forth below, and concentrate on them so that a final vote on these Protocols would not be taken until all members of the Committee had had sufficient time to carefully review the answers to the following questions which we consider important:

1. Is the proposed ticket surcharge excessive in view of the proposed coverage benefits to the international air traveller?

2. Is it in the best interests of consumers of air transportation services to be denied the right to bring suit against an air carrier or foreign air carrier for damages resulting from injury or death in an airline accident involving international air transportation, even in cases of gross negiligence and willful misconduct?

3. Does the Supplemental Compensation Plan and the limits of recovery provided in the Protocols ($317,000 for death) represent a fair and resonable recovery limitation for American air travellers?

4. Should the Committee approve the Protocols when the Supplemental Compensation Plan (SCP), which is inextricably tied to the Protocols, is being challenged in the Federal Courts and before the Civil Aeronautics Board?

5. Does current law or the proposed Protocols provide adequate requirements that passengers receive notice of the limitations of liability applicable pursuant to the Warsaw Convention before their departure?

Under the proposed Protocols, incorporating the Supplemental Compensation Plan, each international passenger would be required to pay, in addition to the ticket price, an initial ticket surcharge of $2 which could go higher depending on the amounts that might be required in payouts. We are concerned about whether such a charge is needed at all, or, if needed, whether the amount is excessive in view of the proposed coverage benefits to the international air traveller. In a recent issue of the New York Law Journal (May 19, 1978), Mr. John Brennan, President of the United States Aviation Underwriters, which manages one of the two major aviation insurance groups in the United States, was quoted as having made the following statement:

"It is incredible to observe the amount of misinformation that is circulated regarding the cost of aviation insurance. For instance, during 1977 the U.S. airlines paid about 40 cents per passenger per round trip for liability insurance limits of up to $400 million per occurrence; 90 percent of these flights were domestic so therefore involved an unlimited liability exposure. Contrast that 40 cent charge with the $2 per passenger round trip charge that advocates of the Supplemental Compensation Plan to the Guatemala Protocol wish to charge for $200,000 excess of $100,000 per passenger. I am still laboring mightily to understand that program."

Mr. Brennan was also quoted as having said that airline insurance rates two years ago were 25 percent to 35 percent of what they were in the previous five years, and that today the rates are probably down to 20 percent of what they were five years ago with no shortage in capacity.

These facts and circumstances present a very perplexing situation in our view. We are inclined to compare our confusion over insurance costs with the Chairman's statement in his November 17, 1977 letter to the Aviation Consumer Action Project in which he stated that, "The Committee has received conflicting information on recovery levels and one of the major difficulties in evaluating the Protocols is making a determination of which set of statistics upon which to rely." For this reason, we are reluctant to consider voting on the Protocols until such time that the Committee is presented with more current and reliable information concerning the cost-benefit relationship of the Supplemental Compensation Plan.

It is reasonable to assume that in any international negotiation there will be compromises or trade-offs that will be necessitated in the interest of arriving at an acceptable agreement. This is particularly true where the negotiators consider the goal of actually reaching an agreement to be paramount to the adoption of specific provisions that may be considered in the best interests of any single contracting party. If, indeed, paramount status is given to the goal of reaching an agreement, otherwise important considerations may be subordinated perhaps to the detriment or potential detriment of the citizens of one or more contracting parties. Is it possible that important considerations of interest to United States consumers were unnecessarily or inequitably subordinated during the negotiations on the Montreal Protocols?

Under current law, United States and foreign air carriers may be subjected to unlimited liability for damages caused by ". . . willful misconduct or by such default . . . as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct." (Warsaw Convention, Article 25(1)). Under the subject Protocols, that rule is drastically modified so as to absolutely preclude the right of United States citizens to bring suit against air carriers or foreign air carriers for damages for death or injury beyond the prescribed limits without regard to whether the damages were caused by willful misconduct. In effect, there has been a trade-off. The right to bring suit has been traded for increased liability limits (from $75,000 to $317,000 for death); unlimited medical payments for life (pursuant to the Supplemental Compensation Plan); and coverage for injury or death resulting from an act of terrorism *aboard an aircraft* (coverage would not apply to ticketed passengers in terminals or waiting areas).

Under current law, aerospace manufacturers (airframes, engines, avionics, etc.) may not avail themselves of the liability limits provided under the Warsaw Convention. The subject Protocols do not alter their clearly precarious status. Therefore, they will continue to be subjected to unlimited liability while the liability of the airlines is limited by law. Is it reasonable or equitable that one segment of the United States air transportation industry be protected (air carriers) while another segment is not (aerospace manufacturers) when both are generally named as codefendants in litigation arising from the same incident?

The basic assumption underlying American tort law is that individuals and society can be best protected against harmful acts of negligence and misconduct by subjecting the negligent party to legal and financial responsibility for his conduct. Legal responsibility for one's conduct serves as a disincentive to negligent actions. To place an absolute maximum limitation of $317,000 (assuming the Supplemental Compensation Plan) on air carrier liability, even in cases of gross negligence or willful misconduct, is contrary to the basic assumption of American tort law. This is true especially in the case of a common carrier, with international recognized higher duties of performance and responsibility to fare-paying passengers. Such a limitation is a dramatic departure from American tort principles.

The Supplemental Compensation Plan, authorized under the proposed Protocols, is inextricably connected to the implementation of the Protocols, and is one of the keystones of the Protocols. The Plan has been approved by the Civil Aeronautics Board, but is being challenged in the Federal Court of Appeals by the Association of Trial Lawyers of America and before the Civil Aeronautics Board by the Aviation Consumer Action Project (ACAP). Should the Committee report these Protocols to the full Senate at a time when the fate of the Supplemental Compensation Plan is so much in doubt?

Under current law, air carriers are required to give notice to international passengers that liability limitations pursuant to international law might be applicable to their journey. The Warsaw Convention requires that notice of such liability limitations be delivered to the passenger by a statement contained in the passenger ticket (Warsaw Convention, Article 3(1)(e)). The Montreal Protocol of May 13, 1966, also requires that the passenger ticket contain a prescribed statement that liability limitations may apply. In addition, the Civil Aeronautics Board (CAB) requires that airlines availing themselves of the Warsaw limitations of liability, ". . . shall also cause to be displayed continuously in a conspicuous public place at each desk, station, and position in the United States which is . . . (used) . . . to sell tickets to passengers . . . sign which . . ." states that the limitation of liability of the Warsaw Convention may be applicable to their journey (14 CFR 221.175).

In their effort to comply with the Warsaw and Montreal requirements, the airlines usually place the prescribed limitation of liability statement at the back of the multi-page ticket stub, the portion of the ticket least likely to be read by the consumer. In their effort to comply with the CAB notice requirement, many airlines place the limitation of liability statement in rather inconspicuous places where the notice is not likely to be seen by consumers. (A recent visit to Dulles International Airport revealed that the Warsaw limitation of liability notices were placed under the ticket counter on the wall of the baggage check gap in the ticket counter about 3 feet below adult eye level and at a rather difficult angle.) The ostensible purpose of all of these elaborate notice requirements is to give passengers an opportunity to make a well reasoned decision as to whether to purchase additional insurance. Our concern focuses upon the question of whether in actual practice consumers recieve such notice. Do all these notice requirements really achieve the desired result?

These are some of our concerns. We wish to emphasize that our interest in this matter stems from our desire to insure that United States citizens travelling on international flights (about 40 percent of the world's international aviation traffic) know exactly what the rules are before they fly, and that their rights as United States citizens are not limited without getting substantial benefits in exchange. In addition, we would not want the Committee to act prematurely while one of the keystones of the Protocols, the Supplemental Compensation Plan, is being litigated in the Federal Courts and before the Civil Aeronautics Board, the agency with primary jurisdiction.

We would encourage our colleagues to delve into the intricacies of these Protocols to determine whether it is in the overall public interest to approve the Protocols.

Sincerely,

RICHARD STONE,
U.S. Senator.
JAMES B. PEARSON,
U.S. Senator.

[Attachments to statement of James E. Landry follow:]

ATTACHMENT A

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
a mutual life insurance company

AGREEMENT TO ESTABLISH SUPPLEMENTAL COMPENSATION PLAN PURSUANT TO ARTICLE 35A OF THE WARSAW CONVENTION AS AMENDED AT THE HAGUE, 1955, AT GUATEMALA CITY, 1971, AND BY THE ADDITIONAL PROTOCOL NO. 3 OF MONTREAL, 1975

NOTICE

The value of the Supplemental Compensation Fund provided for in this Agreement is not guaranteed as to dollar amount but is based on the investment results of Prudential's Variable Contract Account-Guatemala/Montreal Supplement of which said Fund is a part and, as such, is variable, subject to change both up and down.

11/14/75

AGREEMENT TO ESTABLISH SUPPLEMENTAL COMPENSATION PLAN PURSUANT TO ARTICLE 35A OF THE WARSAW CONVENTION AS AMENDED AT THE HAGUE, 1955, AT GUATEMALA CITY, 1971, AND BY THE ADDITIONAL PROTOCOL NO. 3 OF MONTREAL, 1975

WHEREAS, by a Protocol done at Montreal on September 25, 1975, (hereinafter referred to as the "Montreal Protocol No. 3") the signatory Governments agreed to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw October 12, 1929, as earlier amended by Protocols done at The Hague on September 28, 1955 and at Guatemala City on March 8, 1971 (which Convention,as amended at The Hague, at Guatemala City and by Montreal Protocol No. 3, is hereinafter referred to as the "Convention"); and

WHEREAS, the Convention sets forth certain conditions and limits of liability of an air carrier in respect of damage suffered as a result of the death or personal injury of a passenger in international carriage by aircraft as therein defined; and

WHEREAS, Article 35A of the Convention states:

"No provision contained in this Convention shall prevent a State from establishing and operating within its territory a system to supplement the compensation payable to claimants under the Convention in respect of death, or personal injury, of passengers. Such a system shall fulfill the following conditions:

"a) it shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;

"b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that State contributions from passengers if required so to do;

"c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carriers whose services they have used;

> "d) if a passenger has contributed to the system any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system."

NOW, THEREFORE, with the objective of establishing for operation within the territory of the United States of America, a system of supplemental compensation (hereinafter referred to as the "Plan") consistent with Article 35A of the Convention and with the intention of complying with the conditions thereof, the undersigned air carriers that are engaged in performing international carriage of persons by aircraft as defined in Article 1 of the Convention, (such undersigned air carriers being hereinafter referred to as "Carriers") agree with each other and with the undersigned The Prudential Insurance Company of America (hereinafter referred to as the "Contractor") as follows:

Section 1

The Carriers

1.1 Filing of Agreements and Tariffs. Each Carrier shall cause this Agreement and any amendment hereto to be filed with or tendered to, as appropriate, the Civil Aeronautics Board (hereinafter referred to as the "Board") for prior approval under Section 412 of the Federal Aviation Act of 1958, as amended, (hereinafter referred to as the "Aviation Act") and shall include in tariffs filed, posted and published by it pursuant to Section 403 of the Aviation Act the "Plan Surcharge" described in Paragraph 4 of this Agreement.

1.2 Collection and Payment Over of Plan Surcharges. Each Carrier shall collect the "Plan Surcharge" in accordance with Paragraph 4.1 of this Agreement. In so doing, each Carrier, for the purpose only of the Contractor's administration of the Plan, shall be acting as agent for the Contractor and, accordingly, no Carrier shall have any beneficial interest in any monies collected. Each Carrier shall, as promptly as practicable, identify from all funds received by it in respect of international air transportation the amounts representing monies collected as such Plan Surcharges. Once identified, such monies shall forthwith either

a) be segregated by the Carrier from its own funds and held in trust for the Contractor for the purpose of its administration of the Plan, or

b) be paid over to the Contractor.

In any event, within thirty (30) days from the end of each calendar month each Carrier shall pay over to the Contractor the total of all amounts so collected, as determined by the completed revenue accounting transactions for such month recorded in the appropriate account on the books of the Carrier, minus any Plan Surcharges included in refunds made by the Carrier in those cases where the transportation was not performed. Interest at the current "prime" rate (which, for the purposes of this Agreement, shall mean the average of the "prime" rates charged by First National City Bank, Chase-Manhattan Bank and Chemical Bank, all of New York, N.Y.) as of the due date and compounded daily shall be added to all delinquent payments for the period of delinquency; provided, however, that the payment of any such interest shall not excuse any such delinquency. Monies derived from Plan Surcharges, together with any such added interest, are hereinafter referred to as "Plan Credits." No Carrier shall have any obligation to invest monies derived from Plan Surcharges for the account of the Contractor pending their being paid over to the Contractor pursuant to this Paragraph 1.2. Any incidental investment of monies derived from Plan Surcharges prior to their identification as such and payment to the Contractor shall be for the sole account of the Carrier.

1.3 Statistics and Other Data. Not later than sixty (60) days after each anniversary of the Effective Date of the Plan (as defined in Paragraph 3.7 hereof) each Carrier shall submit to the Contractor data which will enable the Contractor to allocate by taxing jurisdiction the total amount of Plan Credits actually paid over to the Contractor during the twelve (12) months preceding such anniversary.

1.4 Retention of Passenger Records. Each Carrier shall maintain for at least twenty-four (24) months after the date of the commencement of international air transportation by any person covered under the Plan (any such person being hereinafter referred to as a "Passenger" and being more fully described in Paragraph 3.3 hereof) the document of carriage described in Article 3, Paragraph 1 of the Convention, or a copy thereof; or, if no such document was delivered, then the record for which provision is made in Article 3, Paragraph 2 of the Convention, or a copy thereof; or any other record containing the information required to be preserved by the said Article 3 of the Convention.

1.5 Information and Notice to Contractor.

a) Each Carrier shall cooperate with the Contractor in providing information in each instance known to such Carrier,

   i) of the death of one of its Passengers; or

   ii) of the suffering of personal injury by one of its Passengers if the aggregate of all actual and expected claims for compensation for damages (exclusive of lawyers' fees and other costs of a legal action) in respect of such Passenger is greater than the monetary limit of an air carrier's liability for damages specified in Article 22 of the Convention.

b) If known by the Carrier, information given in accordance with Paragraph 1.5 (a) hereof shall be expected to include:

i) identification of the Passenger;

ii) identification of each person who has claimed compensation for damages suffered as a result of the death or personal injury of such Passenger (any such person being hereinafter referred to as a "Claimant");

iii) identification of each person whom the Carrier reasonably expects to make such a claim; and

iv) advice as to the amount of each such claim.

c) The appropriate Carrier shall also give prompt written notice to the Contractor of the settlement, by adjudication or otherwise, of any claim for compensation for damages suffered in respect of a Passenger who was the subject of information provided in accordance with Paragraph 1.5 (a) hereof.

d) Any notice given in accordance with Paragraph 1.5 (c) hereof shall include:

i) identification of the Passenger;

ii) identification of the Claimant; and

iii) advice as to the amount of the settlement and as to whether such settlement was in full satisfaction of the claim.

1.6 Claim Evaluation Assistance. To assist the Contractor in its evaluation of claims under the Plan, in every case where the aggregate of all claims for compensation (exclusive of lawyers' fees and other costs of a legal action) for damages suffered as a result of the death or personal injury of a Passenger is greater than the monetary limit of an air carrier's liability specified in Article 22 of the Convention, the Carrier shall cooperate with the Contractor in obtaining, from the Carrier's insurer or otherwise, such information as the Contractor may reasonably request with regard to such Passenger and such claims.

1.7 Withdrawal.

a) Any Carrier, by written notice to the Contractor with a copy to the Board and to each other Carrier, may elect to withdraw from this Agreement.

b) Any such withdrawal shall be effective on the one-hundred-twentieth (120th) day after the anniversary of the Effective Date of the Plan that next follows the date of the Contractor's receipt of such notice; provided, however, that if the number of dollars in the "Net Fund Balance" shown on the Balance Sheet prepared by the Contractor as of the last "business day" (as defined in Paragraph 2.3 (d) hereof) preceding such anniversary in accordance with Paragraph 2.6 hereof divided by the number of Plan Surcharges collected by all Carriers during the year of operation of the Plan preceding such last "business day" is less than five (5) and if during such year of operation of the Plan the withdrawing Carrier carried (or all Carriers whose withdrawals would be effective on the same day together carried) more than ten percent (10%) of the Passengers with respect to whom such Plan Surcharges were collected, then such notice of an election to withdraw shall be deemed to have been received by the Contractor after such anniversary of the Effective Date of the Plan and a new determination of the effective date of withdrawal shall be made following the next anniversary of the Effective Date of the Plan in accordance with the earlier provisions of this Paragraph 1.7 (b); and provided, further, that the Contractor may agree to an effective date of withdrawal earlier than the one-hundred-twentieth (120th) day after the anniversary of the Effective Date of the Plan that next follows the date of the Contractor's receipt of notice of a Carrier's election to withdraw.

c) The last collections of Plan Surcharges hereunder by a withdrawing Carrier shall be on the day immediately preceding the effective date of its withdrawal.

d) Notwithstanding a Carrier's withdrawal from this Agreement, its obligations hereunder shall continue in respect of any Passenger with respect to whom a Plan Surcharge was or should have been collected prior to the effective date of such withdrawal or whose transportation commenced prior to such date.

1.6 Address. Each Carrier shall furnish the Contractor with the address, including the name of an appropriate person located at such address, to which all notices, demands or other communications required or permitted to be given or sent to the Carrier hereunder may be directed in satisfaction of Paragraph 6.9 hereof.

Section 2

The Contractor

2.1 Receipt of Plan Credits. For the purpose of its administration of the Plan the Contractor is the beneficial owner of, and shall be entitled to receive from each Carrier, all monies held as Plan Credits in accordance with Paragraph 1.2 of this Agreement.

2.2 Variable Contract Account-Guatemala/Montreal Supplement. The Contractor shall establish and operate for this Agreement a separate account called "The Variable Contract Account-Guatemala/Montreal Supplement" (and hereinafter referred to as "VCA-GMS"). The Contractor shall invest and reinvest the assets held in VCA-GMS at such times, in such amounts and in such investments as the Contractor in its sole and unlimited discretion shall determine, subject to the limitations applicable to investments for separate accounts of life insurance companies contained from time to time in the New York insurance law. At all times, not less than Ten Million Dollars ($10,000,000) of the market value of the assets held in VCA-GMS shall be cash and debt securities that will mature in one year or less from the date of acquisition. Such securities may include, but are not limited to, commercial paper, bank certificates of deposit and U.S. Treasury Bills. The market value of the assets held in VCA-GMS on any day shall be as determined in good faith by the Contractor. Except as otherwise permitted by Paragraph 5.4 hereof, the Contractor, by introducing its own funds as needed, shall maintain the total market value of such assets at an amount not less than the greater of (a) and (b) where:

(a) is the Supplemental Compensation Fund described in Paragraph 2.3 below, and

(b) is Ten Million Dollars ($10,000,000).

The investment income of VCA-GMS shall be reduced by the investment expenses allocated to VCA-GMS according to such reasonable and customary procedures as are then currently used by the Contractor for separate account expense allocation; provided that until the fifth anniversary of the Effective Date of the Plan (as defined in Paragraph 3.7 hereof) such reduction may not exceed an amount equal to .5% per annum of the average market value of the assets in VCA-GMS. Said limitation on investment expenses following said fifth anniversary may be changed from time to time by the Contractor but only upon written notice to the Carriers, with a copy to the Board, at least six months prior to the effective date of any such change.

2.3 Supplemental Compensation Fund. The Contractor shall establish a "Supplemental Compensation Fund" (hereinafter referred to as the "Fund"), which shall participate in VCA-GMS as described below. The Fund shall be held by the Contractor for the sole benefit of this Agreement and shall not be chargeable with liabilities arising out of any other business of the Contractor. The Fund shall be credited and charged with the following:

(a) Except as provided in Paragraph 5.8 (b) (iv) hereof, the Fund shall be credited with 91.17% of the difference between Plan Credits received by the Contractor and applicable premium taxes.

(b) Except as provided in Paragraph 5.8 (b) (v) hereof, the Fund shall be charged with 95% of all claim payments under the Plan and 95% of all "Direct Claim Expenses" (as defined in Paragraph 2.5 hereof) associated therewith.

(c) The Fund shall be charged with all taxes (other than premium taxes) paid by the Contractor that are attributable to the Fund.

(d) The Fund shall be charged or credited with its allocable share of the net investment results of VCA-GMS (including accrued interest, dividends receivable and capital gains and losses whether or not realized), which shall be computed as of:

i) the last "business day" (as hereinafter defined in this Paragraph 2.3 (d)) preceding each anniversary of the Effective Date of the Plan (as defined in Paragraph 3.7 hereof);

ii) each day on which there was a credit or charge to the Fund pursuant to Paragraphs 2.3 (a), (b) or (c) hereof (any such credit or charge being hereinafter referred to as a "non-investment credit or charge");

iii) the Contract Run-Off Date (as defined in Paragraph 5.3 hereof);

iv) each day on which the Contractor introduces its own funds to or removes its own funds from VCA-GMS; and

v) each other day the Contractor may elect.

(Any day as of which investment results are computed is hereinafter referred to as a "Determination Day." For the purposes of this Agreement, a "business day" is defined to be any day that the Contractor's offices in Newark, N.J. are open for business.) The investment results allocated to the Fund on a Determination Day shall be the product of the amount of the Fund on the most recent prior Determination Day and the "rate of return" on VCA-GMS assets since such most recent prior Determination Day. The "rate of return" on VCA-GMS assets shall be computed by calculating the ratio of the value of VCA-GMS assets on the current Determination Day (before "non-investment credits or charges" for that day) to the value of VCA-GMS assets on the most recent prior Determination Day (after "non-investment credits or charges" for that day) and reducing such ratio by one (1).

(e) Except as provided in Section 5 hereof, no other credits or charges shall be made to the Fund.

2.4 Notice to Claimants. Upon receipt of any information or notice from a Carrier under Paragraph 1.5 hereof, the Contractor shall give prompt written notice to every Claimant or known potential Claimant identified in such information or notice from the Carrier of his or her possible right of recovery against the Contractor hereunder.

2.5 Direct Claim Expenses. For the purposes of this Agreement "Direct Claim Expenses" are defined to include:

(a) expenses incurred by the Contractor in connection with the investigation, adjustment and litigation of claims under the Plan, but excluding the Contractor's general office expenses and the salaries and expenses of its directors, officers and employees;

(b) lawyers' fees and other costs incurred by the Contractor in connection with any legal action instituted to enforce any of its rights or discharge any of its duties under this Agreement;

(c) any payment in good faith by the Contractor under the Plan to the extent that its actual liability is exceeded; and

(d) the amount of any liability arising out of the Contractor's obligations under this Agreement for which no provision is otherwise made in this Agreement that may be imposed upon the Contractor or any director, officer or employee thereof by the final judgment or order of a court of competent jurisdiction or that may be agreed to in any compromise settlement that, in the judgment of the Contractor, appears reasonable and proper under the circumstances, together with lawyers' fees and other costs incurred by the Contractor or such director, officer or employee; provided, however, that no such liability shall be considered a Direct Claim Expense to the extent that it is the direct consequence of willful misconduct, criminal conduct or fraud on the part of the Contractor or such director, officer or employee.

2.6 Annual Accounting.

a) Within one hundred twenty (120) days after each anniversary of the Effective Date of the Plan (as defined in Paragraph 3.7 hereof) the Contractor shall submit to the Board, with copies to each Carrier and to the U.S. Departments of Commerce, Justice, State and Transportation,

i) a Balance Sheet for VCA-GMS as of the last "business day" (as defined in Paragraph 2.3 (d) hereof) preceding such anniversary prepared in the form attached hereto as Exhibit A;

ii) a Statement of Income for the year of operation of VCA-GMS ending on the last "business day" (as defined in Paragraph 2.3 (d) hereof) preceding such anniversary prepared in the form attached hereto as Exhibit B;

iii) a Claim Status Report listing, by Passenger, payee and amount, claims paid during the year of operation of the Plan ending on the last "business day" (as defined in Paragraph 2.3 (d) hereof) preceding such anniversary and claims pending on such day;

iv) the number and amount of Plan Surcharges collected by the Carriers during the just-ended year of operation of the Plan and the total amount of Plan Credits actually paid over to the Contractor during such year;

v) the latest Plan Surcharge Calculation in accordance with Paragraph 4.2 hereof; and

vi) a Statement of Fund Changes for the year of operation of the Fund ending on the last "business day" (as defined in Paragraph 2.3 (d) hereof) preceding such anniversary prepared in the form attached hereto as Exhibit C and such other information pertaining to the Contractor's performance hereunder as may be requested by the Board.

b) Any Balance Sheet, Statement of Income and Statement of Fund Changes submitted by the Contractor pursuant to Paragraph 2.6 (a) hereof shall be accompanied by an accountant's report issued by an independent Certified Public Accountant.

2.7 Compliance With Regulations. Subject only to its right to terminate this Agreement as set forth in Section 5 hereof, the Contractor shall comply with such orders and with such general or special rules, regulations and procedure as the Board may issue or make pursuant to and consistent with the Aviation Act.

Section 3

The Plan

3.1 Definition of "carrier". The term "carrier" used in this Section 3 shall be construed to include any air transportation enterprise that is engaged in performing transportation of persons by aircraft, whether or not any such air transportation enterprise is a party to this Agreement.

3.2 Purpose. The purpose of the Plan is to supplement, in a manner consistent with Article 35A of the Convention, the compensation payable by a carrier in respect of certain deaths and personal injuries arising out of the performance of international air transportation, all as more particularly described in this Section 3.

3.3 Covered Persons

a) Coverage under the Plan shall be afforded in respect of any person whose death or personal injury is caused by an event which takes place during international air transportation on board an aircraft or in the course of any of the operations of embarking or disembarking; provided that

i) at the time of the event causing such death or personal injury (A) such transportation was subject to the Convention and (B) such person had his or her domicile or permanent residence in the territory of the United States, or

ii) the Plan Surcharge specified in Section 4 of this Agreement was or should have been collected hereunder with respect to such person for such transportation.

b) All persons covered under the Plan are referred to herein as "Passengers".

3.4 Basic Benefits; Limits

a) In the case of a Passenger whose transportation was subject to the Convention then, except as provided in Section 5 hereof, if a carrier has agreed to a settlement of all claims for compensation for damages in respect of the death or personal injury of the Passenger to the full extent of the monetary limit of liability for damages specified in Article 22 of the Convention or has been finally adjudged by a court of competent jurisdiction to be liable for such damages and if, except for such limit of liability, the Claimants would have been able to recover further damages from the carrier, the Contractor shall pay additional compensation, the aggregate amount of which shall be the least of

i) Two Hundred Thousand Dollars ($200,000);

ii) the excess, if any, of all damages suffered (exclusive of lawyers' fees and other costs of a legal action) over the monetary limit of an air carrier's liability for damages in respect of death or personal injury specified in Article 22 of the Convention; and

iii) that number of dollars such that the liability of the Contractor in respect of all Passengers whose deaths or injuries were caused by the same event, or were caused by events all occurring at approximately the same time and having a causal relationship with each other, shall be One Hundred Million Dollars ($100,000,000); the limit of liability contemplated by this Paragraph 3.4 (a) (iii) shall be the same for all such Passengers.

b) In the case of a Passenger whose transportation was not subject to the Convention but with respect to whom a Plan Surcharge was or should have been collected then, except as provided in Section 5 hereof, if Claimants have recovered compensation for damages from a carrier in respect of the death or personal injury of the Passenger to the full extent of the monetary limit of liability applicable under national law and if, except for such limit of liability, the Claimants would have been able to recover further damages from the carrier, the Contractor shall pay additional compensation, the aggregate amount of which shall be the least of

i) Two Hundred Thousand Dollars ($200,000);

ii) the excess, if any, of all damages suffered (exclusive of lawyers' fees and other costs of a legal action) over the monetary limit of an air carrier's liability for damages specified in Article 22, Paragraph 1 (a) of the Convention, calculated in accordance with the method of valuation in effect in the United States;

iii) Two Hundred Thousand Dollars ($200,000) less the excess, if any, of all recoveries from the carrier for damages in respect of the Passenger under such national law over the monetary limit of an air carrier's liability for damages specified in Article 22, Paragraph 1 (a) of the Convention, calculated in accordance with the method of valuation in effect in the United States; and

iv) that number of dollars such that the liability of the Contractor in respect of all Passengers whose deaths or injuries were caused by the same event, or were caused by events all occurring at approximately the same time and having a causal relationship with each other, shall be

One Hundred Million Dollars ($100,000,000); the limit of liability contemplated by this Paragraph 3.4 (b) (iv) shall be the same for all such Passengers.

c) No Claimant in respect of any Passenger under this Agreement shall have the right to contest the Contractor's evaluation of any claim in respect of any other Passenger or any payment made in accordance with such evaluation.

d) Nothing contained in this Agreement shall be construed to make the Contractor liable for lawyers' fees and other costs of a legal action incurred by a Claimant hereunder.

e) Even if a Passenger's transportation was not subject to the Convention, nothing contained in this Agreement shall be construed to make the Contractor liable for any payment hereunder unless an action therefor could have been sustained against the carrier under Article 17, Paragraph 1 of the Convention if the transportation had been subject thereto.

f) Nothing contained in this Agreement shall be construed to make the Contractor liable for any payment under this Paragraph 3.4 in any case where the right to recover compensation for damages from the carrier has been extinguished by the passage of the applicable period of limitation for the bringing of a legal action.

g) The liability of the Contractor hereunder shall not be affected by the insolvency of the carrier.

3.5 Supplemental Medical Benefits. Except as provided in Section 5 hereof, if the Contractor has paid the maximum compensation payable under Paragraph 3.4 hereof in respect of the death or personal injury of a Passenger, then the Contractor shall make such further payments as may be required to effect full reimbursement of all reasonable charges for medical services and supplies incurred by or on behalf of such Passenger in the treatment of any personal injury with respect to which a carrier would be liable for damages under Article 17 of the Convention; provided however, that charges for the services of the Passenger or his or her spouse, or of a child, brother, sister or parent of either the Passenger or his or her spouse shall not be eligible for reimbursement under this Paragraph 3.5. The amount of any such payment shall be determined by deducting from charges eligible for reimbursement, but not previously reimbursed, under this Paragraph 3.5 the excess, if any, of

a) the aggregate of the compensation previously paid with respect to the Passenger (i) by the carrier and (ii) by the Contractor under Paragraph 3.4 hereof over

b) the aggregate of the damages suffered in respect of the Passenger exclusive of amounts attributable to medical expenses.

3.6 Claim Evaluation and Settlement.

a) The Contractor shall evaluate claims under the Plan based upon information obtained pursuant to Paragraph 1.6 hereof and upon such other information as it may obtain through independent investigation.

b) The Contractor shall make payments to Claimants in accordance with the terms of the Plan as set forth in this Section 3 not more than sixty (60) days after its receipt of proof of its obligation to make such payments; provided, however, that

   i) a condition precedent to any obligation of the Contractor to make any payment hereunder in respect of any Passenger shall be that the carrier has agreed to a settlement of all claims for compensation for damages in respect of the death or personal injury of such Passenger to the full extent of the monetary limit of its liability under the Convention (or, if the Convention is not applicable, to the full extent of the monetary limit of its liability under applicable national law) or has been finally adjudged by a court of competent jurisdiction to be liable for damages in such amount; and

ii) any payment by the Contractor hereunder shall be in consideration of the execution by the Claimant (or by the person legally entitled to receive such payment in his or her behalf) of an appropriate instrument reasonably acceptable to the Contractor whereunder the Claimant (A) shall release and discharge the Contractor from any further liability for such payment and, if such payment is intended to be in full satisfaction of all claims against the Contractor by such Claimant, from any further liability of the Contractor to him or her and (B) shall agree that, insofar as permitted by law, the Contractor shall be subrogated, to the extent of such payment, to all the Claimant's rights of recovery against any other party except the carrier, its servants or agents; and

iii) the Contractor shall have the right and opportunity to examine the person of any Passenger whose injury is the basis of a claim hereunder when and so often as it may reasonably require during the pendency of such claim; and

iv) where not prohibited by law, the Contractor shall have the right and opportunity to make an autopsy in case of the death of any Passenger in respect of whom a cliam is made under this Agreement.

3.7 Effective Date. The Effective Date of the Plan shall be the date the Convention comes into force for the United States.

3.8 Jurisdiction. The Contractor agrees to submit to the jurisdiction of any court of competent subject-matter jurisdiction within the territory of the United States or, in the event the action against the carrier is one arising under the Convention, then to the jurisdiction of any court of competent subject matter jurisdiction where the Convention permits an action against such carrier to be brought.

Section 4

Plan Surcharges

4.1 Method of Collection. The Carriers agree that a Plan Surcharge shall be collected with respect to every person for whom international air transportation originating within the territory of the United States is to be performed on or after the Effective Date of the Plan, provided that such transportation was purchased or, in the case of gratuitous transportation, the authorization was received, within the territory of the United States. The Plan Surcharge shall be collected at the time of such purchase or authorization or as soon as practicable thereafter. The Plan Surcharge shall not be a part of the fare. When paid, the Plan Surcharge shall be separately recorded on the face of the document of carriage or, in the event no document of carriage is delivered, a record thereof shall be separately preserved as part of the record for which provision is made in Article 3 Paragraph 2 of the Convention.

4.2 Level of Plan Surcharge. The Plan Surcharge effective on the Effective Date of the Plan shall be Two Dollars ($2.00). If Paragraph 5.8 hereof is inapplicable and if the Plan Surcharge being collected on any anniversary of the Effective Date of the Plan is not the same as the Plan Surcharge that was being collected on the immediately previous such anniversary, the current Plan Surcharge shall continue in effect. If Paragraph 5.8 hereof is applicable or if the Plan Surcharge being collected on any anniversary of the Effective Date of the Plan is the same as the Plan Surcharge that was being collected on the immediately previous such anniversary then, within one hundred twenty (120) days after the just-passed such anniversary, the Contractor shall determine in the following manner the new Plan Surcharge to be collected by the Carriers hereunder:

a) The Contractor shall first calculate an "Indicated Plan Surcharge" in accordance with one of the following alternatives:

  i) If the most recent Balance Sheet submitted by the Contractor in accordance with Paragraph 2.6 hereof shows a "Net Fund Balance" that is

    A) negative in the amount of more than Fifty Million Dollars ($50,000,000), the Indicated Plan Surcharge shall be the current Plan Surcharge plus One Dollar ($1.00); provided, however, that, if the current Plan Surcharge is Fifty Cents ($.50), the Indicated Plan Surcharge shall be Two Dollars ($2.00);

    B) negative in the amount of Fifty Million Dollars ($50,000,000) or less, the Indicated Plan Surcharge shall be the current Plan Surcharge plus Fifty Cents ($.50); provided, however, that, if the current Plan Surcharge is One Dollar ($1.00) or less, the Indicated Plan Surcharge shall be Two Dollars ($2.00);

  ii) If the number of dollars in the "Net Fund Balance" shown on the most recent Balance Sheet submitted by the Contractor in accordance with Paragraph 2.6 hereof divided by the number of Plan Surcharges collected by the Carriers during the year of operation of the Plan preceding the day as of which such "Net Fund Balance" was determined is:

    A) equal to or greater than zero but less than five, and such "Net Fund Balance" is less than the "Net Fund Balance" shown on the most recent prior Balance Sheet submitted by the Contractor in Accordance with Paragraph 2.6 hereof, the Indicated Plan Surcharge shall be the current Plan Surcharge plus Fifty Cents ($.50); provided, however, that, if the current Plan Surcharge is One Dollar ($1.00) or less, the Indicated Plan Surcharge shall be the current Plan Surcharge plus One Dollar ($1.00);

    B) equal to or greater than five but less than ten, and such "Net Fund Balance" is equal to or greater than the "Net Fund Balance" shown on the most recent prior Balance Sheet submitted by the Contractor in accordance with Paragraph 2.6 hereof and the current Plan Surcharge is Two Dollars ($2.00) or more, the Indicated Plan Surcharge shall be the current Plan Surcharge minus Fifty Cents ($.50);

C) equal to or greater than ten, and the current Plan Surcharge is Two Dollars and Fifty Cents ($2.50) or more, the Indicated Plan Surcharge shall be Two Dollars ($2.00);

D) equal to or greater than ten, and such "Net Fund Balance" is equal to or greater than the "Net Fund Balance" shown on the most recent prior Balance Sheet submitted by the Contractor in accordance with Paragraph 2.6 hereof and the current Plan Surcharge is Two Dollars ($2.00) or less, the Indicated Plan Surcharge shall be the current Plan Surcharge minus Fifty Cents ($.50).

iii) In any case where none of the above alternatives is applicable, the Indicated Plan Surcharge shall be the current Plan Surcharge.

b) The Indicated Plan Surcharge shall also be the new Plan Surcharge; provided, however, that the new Plan Surcharge shall not be less than Fifty Cents ($.50).

4.3 Basic Premises. It is understood and agreed among the parties to this Agreement that the basic premises underlying the formula set forth in Paragraph 4.2 hereof are:

a) a long term average number of deaths and serious injuries per year of 125 out of each 10,000,000 Passengers;

b) a maximum liability of an air carrier (exclusive of lawyers' fees and other costs of a legal action) under the Convention of One Hundred Thousand Special Drawing Rights (SDR 100,000 - approximately $120,000) per Passenger except as that amount may be increased through the operation of Article 42 of the Convention; and

c) the objective that the number of dollars in the "Net Fund Balance" determined at any given time in the manner specified on the form of Balance Sheet attached hereto as Exhibit A shall tend, over the long term, to be approximately five times the number of Plan Surcharges collected annually by the Carriers.

4.4 Implementing New Plan Surcharge. If the new Plan Surcharge determined in accordance with Paragraph 4.2 hereof (and reported to the Carriers under Paragraph 2.6 hereof) is not equal to the current Plan Surcharge, each Carrier forthwith shall include such new Plan Surcharge in tariffs filed, posted and published by it pursuant to Section 403 of the Aviation Act and shall specify that the effective date of such new Plan Surcharge is to be the one-hundred-eighty-first (181st) day after the just-passed anniversary of the Effective Date of the Plan.

Section 5

Termination

5.1 Contractor's Election. The Contractor, by written notice to the Carriers with a copy to the Board, may elect to terminate this Agreement. Procedures to effect any such termination (as hereinafter more fully described) shall commence:

a) on the last "business day" (as defined in Paragraph 2.3 (d) hereof) preceding the anniversary of the Effective Date of the Plan specified by the Contractor in such notice given at least three (3) years prior to such anniversary; or

b) on the effective date of any statute or action by competent governmental authority affecting the Plan specified by the

Contractor in such notice given at least six (6) months prior to such effective date (or, if such effective date is less than six (6) months after the date of receipt by the Contractor of notice thereof, given promptly after such receipt), if the Contractor reasonably finds that such statute or action,

i) is in conflict with any requirement or obligation to which the Contractor is subject in the conduct of its principal business activities; or

ii) is in conflict with the policies and principles established by the Contractor for the conduct of its principal business activities.

5.2 Pre-emptive Act. Procedures to effect the termination of this Agreement (as hereinafter more fully described) shall also commence on the effective date:

a) of disapproval of this Agreement by the Board; or

b) of denunciation of the Convention by the United States; or

c) of any statute or action of competent governmental authority that precludes the Contractor from continuing its operation of the Plan.

5.3 Contract Run-Off Date.

a) The effective date of the commencement of procedures to effect the termination of this Agreement (as hereinafter more fully described) is herein referred to as the "Contract Run-Off Date."

b) Unless benefits and the collection of Plan Surcharges therefor are continued under Paragraph 5.8 hereof, the last collections of Plan Surcharges hereunder by the Carriers shall be on the day immediately preceding the Contract Run-Off Date.

c) Any Passenger with respect to whom a Plan Surcharge was or should have been collected prior to the Contract Run-Off Date shall continue to be covered under the Plan with respect to, and until the completion of, the transportation for which such collection was or should have been made notwithstanding that any of the component flights were commenced or concluded on or after the Contract Run Off Date.

d) Any Passenger with respect to whom a Plan Surcharge was not and should not have been collected prior to the Contract Run-Off Date shall continue to be covered under the Plan with respect to, and until the completion of, any component flight of his or her transportation that was commenced prior to the Contract Run-Off Date notwithstanding that such flight was concluded on or after the Contract Run-Off Date.

e) Except as provided in this Paragraph 5.3, the Contractor shall have no liability arising out of death or personal injury caused by any event that took place after the Contract Run-Off Date.

5.4 Net Fund Balance. As soon as practicable after the giving or receiving of notice in accordance with Paragraph 5.1 or Paragraph 5.2 hereof the Contractor shall prepare a Balance Sheet showing the "Net Fund Balance" as of the Contract Run-Off Date. Copies of such Balance Sheet shall be sent to the Carriers and to the Board. If the "Net Fund Balance" is positive, the Contractor may then or at any time thereafter, at its election, remove any or all of its funds from VCA-GMS.

5.5 Positive Fund : New Contractor.

a) If the Net Fund Balance determined in accordance with Paragraph 5.4 hereof is positive and if, pursuant to an agreement with the

Carriers, or any of them, approved by the Board, a new "contractor" has undertaken to operate beyond the Contract Run-Off Date a system to supplement the compensation payable by a Carrier under the Convention (or under the Convention as amended) in respect of the death or personal injury of persons in international carriage by aircraft as therein defined, the Contractor agrees to pay over an amount equal to such "Net Fund Balance", as adjusted to reflect actual credits and charges to the Fund in accordance with Paragraph 2.3 hereof, to such new "contractor". At the election of the Contractor such payment may be made:

i) in cash; or

ii) by delivery of securities held in VCA-GMS having a market value equal to such adjusted "Net Fund Balance;" or

iii) partly in cash and partly by delivery of securities held in VCA-GMS having a market value equal to the difference between such adjusted "Net Fund Balance" and such cash payment.

b) Any payment by the Contractor under this Paragraph 5.5 shall be in consideration of the execution by such new "contractor" of an appropriate instrument reasonably acceptable to the Contractor whereunder such new "contractor" shall agree to release, indemnify and hold harmless the Contractor and its directors, officers and employees from:

i) any and all adverse claims of entitlement to such payment or any portion thereof; and

ii) any claims under the Plan as to which reserves established by the Contractor were insufficient or as to which no reserves were established; and

iii) any liability that would be considered to be a "Direct Claim Expense" under Paragraph 2.5 (d) hereof.

5.6 Positive Fund : Other.

a) If the "Net Fund Balance" determined in accordance with Paragraph 5.4 hereof is positive and if, whether by reason of operation of law, denunciation of the Convention by the United States, or otherwise Paragraph 5.5 hereof is inapplicable then the Contractor agrees to pay over an amount equal to such "Net Fund Balance", as adjusted to reflect actual credits and charges to the Fund in accordance with Paragraph 2.3 hereof, to such recipient as may be specified by the Congress of the United States. At the election of the Contractor such payment may be made:

i) in cash; or

ii) by delivery of securities held in VCA-GMS having a market value equal to such adjusted "Net Fund Balance"; or

iii) partly in cash and partly by delivery of securities held in VCA-GMS having a market value equal to the difference between such adjusted "Net Fund Balance" and such cash payment.

b) Any payment by the Contractor under this Paragraph 5.6 shall be in consideration of the execution by the recipient of an appropriate instrument reasonably acceptable to the Contractor whereunder such recipient shall agree to release, indemnify and hold harmless the Contractor and its directors, officers and employees from:

i) any and all adverse claims of entitlement to such payment or any portion thereof; and

ii) any claims under the Plan as to which the reserves established by the Contractor were insufficient or as to which no reserves were established; and

iii) any liability that would be considered to be a "Direct Claim Expense" under Paragraph 2.5 (d) hereof.

Provided, however, that such instrument shall expressly limit liability thereunder to the amount paid to such recipient by the Contractor under this Paragraph 5.6.

5.7 Negative Fund : New Contractor. If the "Net Fund Balance" determined in accordance with Paragraph 5.4 hereof is negative and if a system to supplement the compensation payable by a Carrier under the Convention (or under the Convention as amended) in respect of the death or personal injury of persons in international carriage by aircraft as therein defined can be operated beyond the Contract Run-Off Date and a new "contractor" reasonably acceptable to the Contractor will undertake to operate such a system pursuant to an agreement with the Carriers, or any of them, approved by the Board, then any such agreement shall provide for payments to the Contractor by the new "contractor" such that such "Net Fund Balance", as adjusted to reflect actual credits and charges to the Fund as provided in Paragraph 2.3 hereof, shall reach zero within a reasonable time and such that the Contractor and its directors, officers and employees will be indemnified and held harmless from any claims under the Plan as to which reserves established by the Contractor were insufficient or as to which no reserves were established and from any liability that would be considered to be a "Direct Claim Expense" under Paragraph 2.5 (d) hereof.

5.8 Negative Fund : Other. If the "Net Fund Balance" determined in accordance with Paragraph 5.4 hereof is negative and if, whether by reason of operation of law, denunciation of the Convention by the United States, or otherwise, Paragraph 5.7 hereof is inapplicable, then:

a) With the objective that the "Net Fund Balance" shall become positive within a reasonable time, the Carriers agree to collect on and after the Contract Run-Off Date a Plan Surcharge determined in accordance with Section 4 hereof and to pay over to the Contractor the Plan Credits attributable thereto as provided in Paragraph 1.2 hereof; and the Contractor agrees to provide such benefits as, consistent with the objective of this Paragraph 5.8(a), are determined to be in the public interest by action of the Board.

b) No less frequently than monthly the Contractor shall prepare a Balance Sheet showing the "Net Fund Balance". For the purpose of such determination:

i) Plan Credits attributable to Plan Surcharges collected by the Carriers prior to the Contract Run-Off Date shall be credited to the Fund in accordance with Paragraph 2.3 (a) hereof.

ii) Claim payments (and Direct Claim Expenses associated therewith) in respect of Passengers with respect to whom a Plan Surcharge was or should have been collected prior to the Contract Run-Off Date and whose death or personal injury was caused by an event that took place on or after the Contract Run-Off Date and prior to and in the course of the completion of the transportation for which such collection was or should have been made shall be charged to the Fund in accordance with Paragraph 2.3 (b) hereof.

iii) Claim payments (and Direct Claim Expenses associated therewith) in respect of Passengers with respect to whom a Plan Surcharge was not and should not have been collected prior to the Contract Run-Off Date and whose death or injury was caused by an event that took place on or after the Contract Run-Off Date but with respect to a flight that commenced prior to the Contract Run-Off Date shall be charged to the Fund in accordance with Paragraph 2.3 (b) hereof.

iv) The Fund shall be credited with 97.6% of the difference between Plan Credits attributable to Plan Surcharges collected by the Carriers on and after the Contract Run-Off Date and applicable premium taxes.

v) The Fund shall be charged with 100% of all claim payments (and 100% of all Direct Claim Expenses associated therewith) in respect of persons who are entitled to benefits under Paragraph 5.8 (a) hereof.

vi) Taxes and investment results shall be charged or credited to the Fund in accordance with Paragraph 2.3 (c) and (d) hereof.

c) When a Balance Sheet prepared in accordance with Paragraph 5.8 (b) hereof shows a positive "Net Fund Balance" the Contractor shall give prompt notice of such fact to the Carriers and to the Board. The date as of which such Balance Sheet was prepared shall be considered to be the Contract Run-Off Date specified in Paragraph 5.3 hereof.

5.9 Further Assurances. In addition to the above, the parties agree to implement such other adjustments and procedures as may be necessary or desirable to achieve an orderly and equitable termination of their relationship under this Agreement.

5.10 Termination. When the Contractor has made and received all payments due under this Section 5, this Agreement shall terminate.

Section 6

General Provisions

6.1 One Agreement. This Agreement may be signed in any number of counterparts which, collectively, shall constitute one Agreement.

Each such counterpart shall be deemed an original and it shall not be necessary in making proof of this Agreement to produce or account for more than one such counterpart. This Agreement shall be open to signature by every direct "air carrier" and every direct "foreign air carrier" as those terms are defined in the Aviation Act.

6.2 Effective Date of Agreement. This Agreement shall become effective when all of the following conditions have been satisfied:

a) This Agreement, or counterparts hereof, shall have been signed and filed with or tendered to the Board, as appropriate, by direct "air carriers" and direct "foreign air carriers" (as those terms are defined in the Aviation Act), each holding a then-current certificate of public convenience and necessity or foreign air carrier permit issued pursuant to Section 401 or 402 of the Aviation Act, as appropriate, who (including their predecessors, if any) together carried at least 85% (or, subject to Board approval, such lesser percentage as may be acceptable to all parties hereto) of all passengers departing the United States by air to foreign countries during the calendar year 1973 as determined by the Secretary of Transportation on the basis of available data including Board statistics and Table 11, Part 1 of the United States "Immigration and Naturalization Service Reports of Passenger Travel Between the United States and Foreign Countries" for Calendar Year 1973.

b) This Agreement shall have been approved by the Board in accordance with Section 412 of the Aviation Act.

c) The Montreal Protocol No. 3 shall have been ratified by the United States and the final instrument of ratification required for the Montreal Protocol No. 3 to come into force in accordance with Article VIII thereof shall have been deposited with the Government of the Polish People's Republic.

6.3 Petition to the CAB. Each party to this Agreement hereby constitutes the President of the Air Transport Association of America as its attorney in fact for the purpose of filing with or tendering to the Board, as appropriate, on its behalf its counterpart of counterparts of this Agreement and any submissions relating thereto. Each Carrier holding a certificate of public convenience and necessity under Section 401 of the Aviation Act hereby agrees to petition the Board to adopt a rule or rules to require every "air carrier" and every "foreign air carrier" (as those terms are defined in the Aviation Act) holding a certificate of public convenience and necessity or foreign air carrier permit issued by the Board to become a party to this Agreement or otherwise comply with the provisions hereof.

6.4 Term of Agreement. This Agreement shall continue in effect until terminated as provided in Section 5 hereof.

6.5 Action Against the Carriers. The Contractor agrees to exercise any right of action against a Carrier that is necessary for the Contractor to fulfill its obligations under this Agreement and that is consistent with Article 35A of the Convention.

6.6 Inspection of Records. The records of the Carriers that have a bearing on this Agreement shall be open to inspection by the Contractor at any reasonable time. The records of the Contractor that have a bearing on this Agreement shall be open to inspection by the Board at any reasonable time.

6.7 Governing Law. The validity of this Agreement and its provisions shall be determined under the laws of the State of New Jersey exclusive of the law of conflict of laws of that jurisdiction.

6.8 Governing Time. All dates specified in this Agreement shall be determined on the basis of the local time a the seat of the Government of the Polish People's Republic.

6.9 Notices. All notices, demands or other communications required or permitted to be given or sent hereunder shall be in writing and shall be deemed to be duly given or received if and when hand delivered or sent by registered mail, return receipt requested, postage prepaid, or, in the event of emergency, by telegraph, as follows:

a) If by the Contractor to a Carrier, to the address furnished to the Contractor by such Carrier pursuant to Paragraph 1.8 hereof.

b) If by a Carrier to the Contractor, to:

The Prudential Insurance Company of America
Prudential Plaza
Newark, New Jersey 07101

Attention: Senior Vice President and Chief Actuary

6.10 Applicability of Article 35A. This Agreement is hereby made subject to the provisions of Article 35A of the Convention as hereinabove set forth. In the case of any inconsistency, the provisions of the said Article 35A shall prevail.

6.11 No Change in Carrier's Liability. Nothing contained in this Agreement shall be construed to create any liability on the part of a Carrier in respect of the death or personal injury of a Passenger.

6.12 Headings. The headings of the Sections and Paragraphs contained in this Agreement are inserted for convenience only and shall not constitute a part hereof.

6.13 Entire Agreement. This Agreement contains the entire understanding among the parties hereto in respect of the subject matter contained herein and may be amended only by a duly executed written instrument or instruments.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their corporate officers.

Carrier: ______________________________

By: ____________________ Attest: ____________________

Title: ____________________ ____________________

EXHIBIT A

TO

AGREEMENT TO ESTABLISH
SUPPLEMENTAL COMPENSATION PLAN
PURSUANT TO ARTICLE 35A OF THE WARSAW CONVENTION
AS AMENDED AT THE HAGUE, 1955, AT
GUATEMALA CITY, 1971, AND BY THE
ADDITIONAL PROTOCOL NO. 3 OF
MONTREAL, 1975

Variable Contract Account - Guatamala/Montreal Supplement

Balance Sheet

Month, Day, Year

Assets

Investments (Specify by type) $
Cash and Short Term Investments
Accrued Investment Income
Other ________

Total $________

Liabilities and Net Fund Balance

Claims:
Pending Claims $
Incurred But Not Reported Claims (Note)
Direct Claim Expenses Due or Accrued
Taxes Due or Accrued
Other
Contractor's Equity ________

Total $________

Net Fund Balance $________

(Note) "Reserve for losses incurred for which no claim has been filed."

EXHIBIT B

TO

AGREEMENT TO ESTABLISH SUPPLEMENTAL COMPENSATION PLAN PURSUANT TO ARTICLE 35A OF THE WARSAW CONVENTION AS AMENDED AT THE HAGUE, 1955, AT GUATEMALA CITY, 1971, AND BY THE ADDITIONAL PROTOCOL NO. 3 OF MONTREAL, 1975

Variable Contract Account - Guatemala/Montreal Supplement

Statement of Income (Accrual Basis)

For the Period Ended, Month, Day, Year

Investment Income	
Dividends	$
Interest	
Other	
Total Income	$
Expenses	$
Net Investment Income	$
Plan Credits	
Plan Credits Received	$
Less: Contractor's Share	
Net Plan Credits	$

EXHIBIT C

TO

AGREEMENT TO ESTABLISH SUPPLEMENTAL COMPENSATION PLAN PURSUANT TO ARTICLE 35A OF THE WARSAW CONVENTION AS AMENDED AT THE HAGUE, 1955, AT GUATEMALA CITY, 1971, AND BY THE ADDITIONAL PROTOCOL NO. 3 OF MONTREAL, 1975

Variable Contract Account - Guatamala/Montreal Supplement

Statement of Fund Changes

For the Period Ended Month, Day, Year

Net Fund Balance, Beginning of Period	$
Net Plan Credits	
Net Contributions (withdrawals) by Contractor	
Net Investment Income	
Increase (decrease) in unrealized appreciation of investments	
Realized Capital Gains (Losses)	
Claims Benefits	
Claims Expenses	
Taxes	
Other	
(Increase) decrease in Contractor's Equity	
Net Fund Balance, End of Period	$

Attachment "C"

SERVICE LIST

Carriers Holding Certificates of Public Convenience and Necessity in Accordance with Section 401 of the Federal Aviation Act

Service List not included.

ATTACHMENT B

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON D. C.

Agreement Among Certain Air Carriers Serving the United States and The Prudential Insurance Company of America Establishing Supplemental Compensation Plan Pursuant to the Amended Warsaw Convention	Docket Agreement CAB

COMMENTS IN SUPPORT OF SUPPLEMENTAL COMPENSATION AGREEMENT

PAUL R. IGNATIUS
President
Air Transport Association
of America
1709 New York Avenue, N. W.
Washington, D. C. 20006
Attorney in Fact

December 31, 1975

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Agreement Among Certain Air Carriers Serving the United States and The Prudential Insurance Company of America Establishing Supplemental Compensation Plan Pursuant to the Amended Warsaw Convention

Docket
Agreement CAB

COMMENTS IN SUPPORT OF SUPPLEMENTAL COMPENSATION AGREEMENT

Essentially the Agreement for which approval is requested in accordance with Section 412 of the Federal Aviation Act, provides for a supplemental compensation plan funded by collections from passengers to permit recovery for death or injury in excess of the limit specified in the Guatemala Protocol;[1] establishes a separate fund to be utilized in providing the additional compensation; and delineates the roles and obligations of the airline Parties to the Agreement and The Prudential Insurance Company of America ("Contractor" or "Prudential") who will administer the program. Before going into detail as to how the plan will operate, it would be useful to review some of the events and United States Government decisions leading to Protocol No. 3, the insistence of the U.S. Government that a supplemental plan be established, the Government's role in specifying its contents and how that plan was developed and an agreement reached.

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[1] There have been several Protocols to the Warsaw Convention including The Hague Protocol which was never ratified by the United States and "Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as amended by the Protocols Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971" ("Protocol No. 3"). In this paper, reference to the "Warsaw Convention" or "Convention" is to the original Convention.

Insofar as the passenger regime is concerned, Protocol No. 3 differs only in two respects with the Guatemala Protocol. It replaces the gold franc used to express the limitation on carrier liability with the Special Drawing Right and it removes the percentage requirement from the Final Clauses so that Protocol No. 3 can now come into effect when ratified by any thirty member states, regardless of their percentage of total international scheduled air traffic. Only the adoption of Special Drawing Rights has a bearing on the Supplemental Agreement. See Application for Prior Board Approval of Agreement, pp. 2-5.

Background

The Warsaw Convention is one of the most widely subscribed treaties of modern times. Its accomplishments are substantial and the discipline it has brought to air travel and liability law is significant. It is the legal structure through which international air transportation documents have been made uniform. In addition, much of the confusion and uncertainty as to who must answer for damages in the case of mishap, and in what jurisdiction, have been removed by this Convention. This was recognized by the Civil Aeronautics Board ("the Board") in its 1966 order approving the Montreal Agreement. The Board put it this way:

> "The Convention for the Unification of Certain Rules Relating to International Transportation by Air, generally known as the Warsaw Convention creates a uniform body of law with respect to the rights and responsibilities of passengers, shippers, and air carriers in international air transportation."[2]

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[2] CAB Order E-23680 (May 13, 1966), p. 1.

The Convention has been criticized on the grounds that the limitation on recovery is believed to be too low for many U.S. citizens. Another criticism, shared with the tort regime generally, is that recovery is never certain and that too much time is consumed in litigation. Added to that is the recognition that recovery, when received, frequently is substantially diminished by the cost of litigation, particularly the lawyer's contingency fee.

The United States Government has faced a dilemma for a number of years: Should it continue to adhere to a treaty useful in so many respects, or withdraw from it because the limits are too low? On November 14, 1965 the U. S. Government served notice of denunciation of the Warsaw Convention "solely because of the Convention's low limits of liability for personal injury or death to passengers."[3] That notice was rescinded in 1966 when the carriers serving the United States entered into the aforementioned Montreal Agreement. That agreement, found acceptable by the Board, waives the Warsaw limits up to $75,000 and accepts absolute liability.[4] Among its reasons for approving that agreement, the Board included:

> "... Implementation of the agreement will permit continued adherence to the Convention with the benefits to be derived therefrom, but without the imposition of the low liability limits therein contained upon most international travel involving travel to or from the United States. . . ."[5]

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[3] CAB, Order E-23680, p. 1.

[4] Id., p. 2.

[5] Id., p. 3.

Nevertheless, the U.S. Government has regarded the Montreal Agreement as an interim arrangement and for the past nine years has been seeking ways in which the treaty could be revised to permit its continued participation. The Guatemala Protocol, opened for signature in 1971, reflects the efforts of the United States to secure considerably higher limits and to assure certain and swift recovery. Those achievements are continued in Protocol No. 3.

In 1969, at the time of the meeting of the ICAO Legal Committee at which the agenda for the then forthcoming Diplomatic Conference at Guatemala City was prepared, a limit of $100,000 seemed adequate and the United States supported a proposal to that effect. This limit was included in the Conference agenda. Absolute liability, another feature of that agenda, removed doubt that claimants would prevail against the airline upon proof of damages. A settlement inducement clause -- compelling a carrier to make an offer in writing within six months of receipt of a claim at peril of paying costs, including attorney fees, in the event the court should award more damages -- was designed to encourage settlements and speed up the disposition of claims.

Thus, the ICAO draft met the demands of the U.S. Government that the new regime assure certainty of recovery, adequacy of recovery and speed of recovery. Absolute liability met the first requirement; the new $100,000 limit met the second; and together the absolute liability provision and the settlement inducement clause fulfilled the last.

Just before the Guatemala Conference was convened, however, a survey of non-Warsaw recoveries conducted by the Board suggested that $100,000 was not enough for American citizens.[6] Despite its stewardship in preparing the agenda at ICAO, the U. S. deemed it necessary to provide for recovery in excess of the previously agreed limit and accomplished this objective by securing the addition of Article XIV to the Guatemala Protocol.[7] That article clarifies the right of any signatory party to establish a supplemental plan within its territory and imposes certain conditions that must be met in operating such a plan.

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[6] CAB, Levels of Recoveries on Account of Passenger Deaths and Serious Injuries in Airplane Accidents (released November 18, 1970).

[7] This article, continued in Protocol No. 3, reads as follows:

"Article 35A

"No provision contained in this Convention shall prevent a State from establishing and operating within its territory a system to supplement the compensation payable to claimants under the Convention in respect of death, or personal injury, of passengers. Such a system shall fulfill the following conditions:

"a) it shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;

"b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that State contributions from passengers if required so to do;

"c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carrier whose services they have used;

"d) if a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system."

Shortly after the return of the U. S. Delegation from Guatemala City, the U. S. Government announced that the Protocol would be transmitted to the Senate for advice and consent only when a satisfactory supplemental plan was devised. It called upon the carriers serving the United States, bar association groups, the academic community, the insurance industry and other individuals, groups and organizations to suggest how a plan embracing a number of specified requirements should be structured.

Working with its counterparts in other carrier associations, a group of carrier members of the Air Transport Association ("ATA") submitted two proposals: one to be administered by the Secretary of Transportation; another, identical in all substantive respects, to be run by a private entity.

The Government representatives favored the idea of a privately operated plan and made many revisions to the draft proposal submitted by the carriers -- some of them developed within the Government, some based on thoughts advanced by other interested persons and groups. The airlines were then requested to meet with individuals and private business entities to work out an agreement based on the requirements written into the draft proposal by the Government representatives and refined by them from time to time in meetings with carrier representatives and other interested parties.

Among the Government's requirements -- requirements that have made it difficult to finalize the Agreement -- are specifications that a supplemental plan provide for recovery of provable damages of up to $200,000 over the Protocol limit (i.e., 100,000 SDR's under Protocol No. 3); that the initial charge to passengers not exceed $2; that it cover domiciliaries and permanent residents of the United States regardless of whether they paid the charge; and that approximately 90 percent of the charges collected be available for payout to claimants.

The carriers made an effort to interest a wide group of private entities in operating such a plan. Individual letters from the then Chairman of the Board of ATA attaching the Protocol and the draft proposal were sent to the insurance community urging the submission of proposals in keeping with the aforesaid Government requirements. In addition, ATA placed advertisements in The Wall Street Journal and The Journal of Commerce directing attention to the Protocol and the proposed plan and urging interested parties to write for copies.[8] It also invited those interested to attend a

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[8] The wording of the advertisements were identical in each newspaper. They read as follows:

"PUBLIC NOTICE

"The U.S. Government is considering a privately operated plan to provide additional compensation to claimants whose personal injury recovery against airlines would be limited by the GUATEMALA

(footnote continued on page 8)

meeting on September 6, 1972 in the auditorium of the Federal Aviation Administration in Washington, D.C. at which time airline and Government representatives would further explain the proposed plan and answer questions about it. Following that meeting, several parties expressed an interest in exploring the matter further. Some made suggestions as to how the plan could be improved and listed changes that would have to be made if they were to participate -- others submitted comprehensive proposals of their own. From time to time some of the individuals and groups met with airline and Government representatives in an effort to devise an agreement meeting the Government's requirements which, at the same time, would be acceptable to them and to the airlines.

8/ (footnote continued from page 7)

PROTOCOL TO THE WARSAW CONVENTION. The plan, an agreement among airlines and a person or organization ("Contractor") who would be responsible for providing the additional compensation from charges collected from passengers by airlines and their agents, will be explained by airline and Government representatives at 10:00 a.m. on Wednesday, September 6, 1972, FAA Auditorium, 3rd Floor, 800 Independence Avenue, S.W. Washington, D.C. All persons and organizations interested in participating as the "Contractor" in such an agreement to implement and operate this multi-million dollar compensation program are invited to attend.

"Copies of the proposed plan and the Protocol will be available at the meeting. Interested parties are encouraged to obtain these documents in advance by writing: Ben Franklin Station, Box 14086, Washington, D.C. 20044."

Arriving at such an agreement was not easy and it has taken a long time to achieve. The basic problem was that few interested parties were willing to take the risks of making huge outlays of capital with the possibility of a loss should the plan be discontinued while in a negative position without at least a chance of making a reasonable profit if experience were good.[9] Some were willing to undertake the program but insisted on indemnification from either the carriers or the Government in the event they were left in a deficit position on termination of such a plan. Since neither was in a position to offer indemnification and since reinsurance arrangements involved unacceptable costs, it became apparent that a way had to be found to permit the plan to continue until such a deficit could be recovered. This meant that anyone willing to undertake such an arrangement had to have access to substantial resources. Subsequently, in evaluating the terms of a plan, many calculations were made involving various numbers of accidents and amounts of recoveries. In some of them, the deficit grew to more than $100,000,000. There are very few financial institutions which have available resources of this magnitude.

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[9] As aforesaid, one of the Government requirements is that approximately 90 percent of the collected charges must be available for payout. Another requirement limits administrative costs.

The Agreement in which Prudential agrees to act as Contractor satisfied these conditions. It is an arrangement acceptable to the Government representatives under whose oversight discussions took place.

We turn now to a consideration of the plan embodied in the "Agreement to Establish Supplemental Compensation Plan Pursuant to Article 35A of the Warsaw Convention" which we request the Board to approve.

The Agreement

As previously stated, the Government's requirements are stringent. The fact that few comprehensive proposals were received is no doubt attributable to some of those requirements, especially the ones limiting profit, i.e., the 90 percent payout criterion and the $2 ceiling on the initial charges. Thus, the Agreement is structured to minimize the Contractor's risk without sacrificing the objectives of the Plan. Several sections are devoted to such things as Prudential's share of the risk and procedures permitting it to be made whole in the event the plan is discontinued for reasons beyond Prudential's control during a deficit period.

Substantively, the Plan, which provides for a recovery against the Contractor of up to $200,000 per passenger with an overall limitation of $100,000,000 for all deaths and injuries caused by the same event (Section 3.4), parallels Protocol No. 3 in most respects. Where it does not, it confers benefits beyond those contemplated by the Protocol. This is how it will work:

All participating carriers[11/] will publish tariffs specifying a "Plan Surcharge" ("Surcharge") on all transportation sold in the United States or its territories ("United States") for trips beginning in the United States and destined for a point outside.[12/] Whether the passage is one-way or round trip does not matter; the Surcharge is the same. The collections must be transmitted to Prudential within 30 days. Interest will be payable on late transmittals.[13/]

Paragraph 2.3(a) provides that 91.17 percent of the difference between "Plan Credits" (the sum of Surcharges collected plus any interest due) and applicable premium taxes assessed by state taxing jurisdictions will be credited to the "Supplemental Compensation Fund" (the "Fund"). Prudential's own account will be credited with the remaining 8.83 percent, from which it will pay its share of claims and expenses and which includes margins for contingencies and profit.

The Fund will pay 95 percent of all claims and "direct claim expenses".[14/] If the Fund's obligations exceed the amount available,

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[11/] See Paragraph 6.2 and 6.3 of the Agreement.

[12/] As set out in Section 4.1, the charge, which will be recorded on the face of the document of carriage, will be collected at the time of purchase or as soon as practicable thereafter.

[13/] See paragraph 1.2 of the Agreement.

[14/] Paragraph 2.3(b) of the Agreement.

Prudential will advance funds, at interest, out of its own resources. As noted earlier, the Agreement includes protections to insure that Prudential will not be left in a deficit position with respect to the Fund's share of claims. (The Agreement also provides for disposition for public purposes of any balance in the Fund at termination.)

For various reasons (not the least of which is the objective of insulating the Fund from claims that might arise out of other business conducted by Prudential), all monies credited to the Fund will be held in a "separate account" as permitted by New Jersey law. This separate account has been designated "The Variable Contract Account - Guatemala/Montreal Supplement" ("VCA-GMS").[15/] VCA-GMS assets will be invested and reinvested within the constraints of New York insurance law, which is more specific in this area than is the case in most other states.

At the outset the Surcharge will be $2; however, depending upon the experience of the Fund, it may vary from time to time in accordance with an adjustment formula set forth in Section 4.2 of the Agreement. To keep the Surcharge from fluctuating too frequently, adjustments will be made no more often than biennially. To lend stability to the Fund, the formula calls for no downward adjustments

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15/ A description of the operation of VCA-GMS is contained in the "Memorandum for Mr. Boyle" from Irving Patrick Fox, Vice President and Associate General Counsel of Prudential, dated July 11, 1974, which is annexed as Attachment "A". See also Section 2.2 of the Agreement.

while the Fund is less than five times the number of Surcharges collected the previous year.

The level of the charge, of course, is a function of experience and no one can be sure how the Fund will fare over the years. If there is good experience allowing a buildup of reserves, the Surcharge will be reduced. The formula, which by operating automatically avoids possible procedural delays in implementing the new Surcharge, provides for reducing it to as low as fifty cents. In the course of developing that formula, the Government representatives requested Prudential to make a number of computer simulations to give an indication of what the state of the Fund and the level of the Surcharge could be, based on various levels of average claims. The results of these simulations are contained in Attachment "B".

On the basis of past experience, there is no reason to suppose that it would ever be necessary for the Surcharge to be increased to an unreasonably high level. Under the worst set of assumptions, (Attachment "B", Scenario E) there are only three out of the twenty-five different simulations where the Surcharge increases to more than $4. Furthermore, in these three simulations, the Surcharge is more than $4 in only a few of the 21 years covered. The average Surcharge under the above assumptions is $2.62. However, should we be wrong -- should experience be so consistently bad that the formula causes the Surcharge to become intolerably high -- we would expect the Board to undertake a review of the Agreement to determine what, if anything, can be done to rectify the situation. Based on that review, which presumably would indude consultation with other concerned branches of the Government, we assume that the Board would require appropriate changes or, subject to the protections afforded Prudential by the Agreement, withdraw its approval of the Agreement.

Section 5 of the Agreement contains the provisions with regard to termination referred to earlier. If the Agreement is terminated when, estimated unsatisfied obligations considered, the Fund has a positive balance, it will be turned over to a new "contractor" who agrees to operate the Plan or another plan to provide supplemental compensation acceptable to the Board. In the event a new "contractor" cannot be found, that balance will be paid "to such recipient as may be specified by the Congress of the United States."[16] If the Fund is negative, Prudential would be reimbursed for its advances by a new "contractor". If a new "contractor" is not forthcoming, Prudential would continue to operate the Plan or provide other benefits "determined to be in the public interest by action of the Board"[17] until the Fund attains a positive balance.

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[16] See paragraph 5.6 of the Agreement.

[17] See paragraph 5.8(a) of the Agreement.

The Government representatives insisted that the benefits extend to all individuals for whom the U.S. Government feels some responsibility. The primary purpose of the Plan, therefore, is to supplement recoveries by U.S. domiciliaries and permanent residents. Thus, coverage under the Plan extends to those U.S. domiciliaries and permanent residents whose journeys are subject to the Convention whether or not a charge is collected. This includes American citizens temporarily living abroad as well as those who travel extensively outside the United States and purchase transportation in a foreign country, e.g., citizens who purchase tickets in London for a trip to Paris or New York. Since it is not feasible to attempt to impose and collect a Surcharge in a foreign jurisdiction, as aforesaid, collections will only be made in the United States. However, the initial Surcharge has been fixed at a level which will allow for the coverage to be extended to passengers who make no contribution or those individuals claiming through them.

Benefits under the Plan are not restricted to domiciliaries and permanent residents of the United States. Paragraph 3.3(a) of the Agreement extends them to persons claiming though a passenger from whom the Surcharge was or should have been collected. For example, anyone claiming through a foreign visitor who purchased transportation to a foreign destination while in the United States would be entitled to proceed against the Contractor under the Agreement in those cases where carrier liability is limited by Protocol No. 3.

The coverage, up to an overall limit of approximately $300,000,[18] fulfills the U. S. objective of certain and speedy recovery at a reasonable level. Under the Agreement, persons claiming through domiciliaries or permanent residents of the United States or anyone else to whom the Surcharge applies, can expect to receive truly meaningful benefits without delay and without having those benefits diminished by the very substantial cost of litigation, as is the case today. For instance, within six months, most claimants can expect to receive up to $200,000 from Prudential. Conservatively invested in high grade corporate bonds bearing interest at 8 percent, this, added to the $100,000 that will be received from the carrier if the Protocol comes into effect, would be the equivalent of a $350,000 recovery two years later under the present system. This is not an insignificant sum and it will go a long way in providing security.

In many instances, carrier liability is limited by foreign or local law, often to amounts far less than the Protocol limit. The Surcharge contributes to the funding of benefits available in those

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18/ This amount consists of $200,000 coverage by Prudential, plus $100,000 recovery from the carrier under the Protocol unadjusted to take account of the value of the U. S. dollar *vis a vis* the SDR. Recent SDR values would increase the carrier limit to somewhere between US$115,000 and US$120,000.

cases. Under the Agreement, a claimant, whose claim is so limited is entitled to compensation from Prudential for damages up to $200,000 without being put to the burden of proving fault if the damages exceed $100,000. If, for instance, liability were limited by local law to $40,000 and damages were held to be $200,000, the claimant would be entitled to receive $100,000 from Prudential. If the damages were $300,000 or more, the amount available from Prudential would be $200,000. Although not required by the Government's objectives or criteria, this benefit, itself substantial, can prove useful to many claimants, including some U.S. domiciliaries and permanent residents.

Another instance in which the Agreement goes further than Protocol No 3 is the provision for supplemental medical benefits. These benefits begin when the maximum recoveries from the carrier ($100,000) and the Contractor ($200,000) have been exhausted. They extend to all persons, on all journeys, described above, and they are unlimited. To prevent making the same payment twice, any claim attributable to medical expenses previously paid by the carrier or the Contractor as part of the basic benefits will be deducted from the medical benefits. It is contemplated that Prudential will pay the supplemental benefits upon an appropriate showing that the expense has been incurred. To avoid complicating this straight forward procedure, services provided by close relatives, services which are as difficult to quantify as they are to verify, are not eligible for reimbursement. This is a long standing practice in the health insurance industry.

Since there is no monetary limitation on the payment of medical benefits, this feature of the Plan will eliminate the danger that a claimant might exhaust his resources and be faced with a lifetime of continuing medical expenses with no means of paying them.

Summary and Conclusion

As set forth above, the Warsaw Convention is a widely subscribed treaty. In addition to providing a uniform liability regime, it facilitates crucially needed uniformity in air transport documents such as passenger tickets and airway bills. Because the U.S. Government believed that the limits were too low, it served notice of denunciation in 1965. The notice was withdrawn in 1966 when the carriers serving the United States executed the Montreal Agreement waiving defenses under the Convention and agreeing to liability up to $75,000. In approving that agreement, the Board noted that it would permit continued adherence to a beneficial treaty without imposition of the low limits it specified.

Since that agreement was approved in 1966, the Executive Branch of the U.S. Government has been striving to secure an even better system for compensating victims of aircraft accidents within the framework of the Warsaw Convention.

The Government's objectives[19] are reflected in the Guatemala Protocol which the United States representatives signed in Guatemala City. In furtherance of those objectives, the Government representatives have made the submission of the Protocol to the Senate contingent upon development of a satisfactory supplemental compensation plan. Government representatives also laid down stringent requirements as to the contents of such a plan and participated with carrier groups and potential contractors in working out an agreement.

It is submitted that the Supplement Agreement, to be implemented under Article 35A of the Convention, complies with all of these Government requirements. As we have previously stated, the Agreement is a means through which airline passengers will be provided with the type and amount of coverage the Government representatives deem necessary for U.S. domiciliaries and permanent residents.

Provision for a speedy recovery of an additional $200,000 in provable damages is not the only benefit offered to claimants under the Plan. By offering unlimited medical payments to passengers who are seriously injured and who require long, and in some cases interminable, hospitalization, the Agreement extends supplemental benefits to those who need them most. This provision of the Agreement eliminates any likelihood of litigation, and the concomitant cost of litigation. Hence, one hundred percent of the supplemental medical payments made under the Plan can be applied to the cost of hospitalization and medical care. This, we submit, is as it should be and it underscores how the Agreement will serve the public interest.

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[19] These objectives are continued in Protocol No. 3.

As aforesaid, passenger contributions will be transmitted to Prudential within 30 days and will form the corpus of the Fund. The carriers' only obligations under the Agreement are to file appropriate tariffs, transmit the collections made pursuant to them, and furnish various statistical information to Prudential They have no role in managing or operating the Plan. They do not stand to profit or suffer financial losses as a result of the operation of the Plan. There is no way one carrier can gain an advantage over another by virtue of the Plan since the only expense or burden to the carrier is that associated with collecting and remitting the Surcharge. As detailed above, the Plan is structured to minimize risk to all parties. It will be administered solely by Prudential, a sound and reliable insurance company, and will be subject to the continuing oversight of the Board.

In addition to providing significant benefits and being professionally managed, the Plan set forth in the Agreement, will provide the coverage described above at a wholly reasonable charge. We have several times noted that the Government requirements limited the initial surcharge to $2. Future charges will depend on experience. However, as detailed on pages 12 through 14 above, there is no reason to suppose that experience will drive them unreasonably high.

In sum, the Plan, set forth in the Agreement, like the Protocol No. 3, meets the Government's objectives of providing claimants with certainty of recovery, speed of recovery and adequacy of recovery. It provides supplemental coverage for some individuals, including U.S. domiciliaries and permanent residents, whose recovery is limited by national or local law; and, it specifies a generous program of medical benefits. The Agreement therefore, commends itself for consideration and approval.

The decision of whether or not to ratify Protocol No. 3, of course, is up to the United States Senate once it is transmitted for advice and consent. Decision on whether or not to approve the Agreement devolves upon the Board. Section 412 of the Federal Aviation Act requires approval unless the Board finds that the Agreement is adverse to the public interest. It is submitted that the Agreement, which facilitates U.S. Government policy of updating the Warsaw Convention and provides meaningful benefits not required by Protocol No. 3, is wholly commensurate with the public interest.

WHEREFORE, the above premises considered, it is respectfully requested that the Board approve the "Agreement to Establish Supplemental Compensation Plan Pursuant to Article 35A of the Warsaw Convention as Amended at The Hague, 1955, at Guatemala City, 1971, and by the Additional Protocol No. 3 of Montreal, 1975."

Respectfully submitted,

/s/ Paul R. Ignatius
Paul R. Ignatius
President
Air Transport Association
of America
1709 New York Ave., N.W.
Washington, D.C. 20008
Attorney in Fact

December 31, 1975

ATTACHMENT C

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

- -

Agreement Among Certain Air Carriers
Serving the United States and The
Prudential Insurance Company of
America Establishing Supplemental
Compensation Plan Pursuant to the
Amended Warsaw Convention

- -

Docket 28713
Agreement CAB 25632

CONSOLIDATED REPLY TO ANSWERS TO APPLICATION FOR PRIOR BOARD APPROVAL OF AGREEMENT

PAUL R. IGNATIUS
President
Air Transport Association
of America
1709 New York Avenue, N. W.
Washington, D. C. 20006
Attorney in Fact

February 20, 1976

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BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Agreement Among Certain Air Carriers Serving the United States and The Prudential Insurance Company of America Establishing Supplemental Compensation Plan Pursuant to the Amended Warsaw Convention

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Docket 28713
Agreement CAB 25632

CONSOLIDATED REPLY TO ANSWERS TO APPLICATION FOR PRIOR BOARD APPROVAL OF AGREEMENT

The parties to the Supplemental Compensation Agreement ("Agreement" or "Supplemental Agreement") for which Prior Board Approval was requested on December 31, 1975, by their Attorney in Fact, reply as follows to various answers filed in this docket:

I. INTRODUCTION

As stated in the Application for Prior Board Approval ("Application") and in the Comments in support thereof, the Supplemental Agreement was adopted in accordance with Article 35A[1] of the amended Warsaw Convention and was structured to comply with guidelines established by representatives of the United States Government under whose oversight the Agreement was drafted and most of the negotiations with individuals and organizations expressing an interest in operating the Supplemental Compensation Plan ("Plan") embodied in the Agreement were conducted. The considerations leading to the Agreement, a description of the Plan and how it will work, as well as the procedure followed in finding a Contractor willing to administer it are set forth fully in the Comments accompanying the Application (Comments pp. 6-18) and will not be repeated in detail in this Reply.

Briefly, the Plan would permit recovery of provable damages up to $200,000 above the $117,000 (approximate) limitation on carrier liability established by Protocol No. 3. It would be funded by a beginning charge of $2.00 which the carriers agree they will publish in their tariffs, collect on international journeys sold and beginning in the United States and transmit to the Contractor (Prudential[2]). Prudential will administer the Plan and make payment of claims thereunder. The charge will be adjusted from time to time in accordance with Section 4.2 of the Agreement, subject to the Board's continuing jurisdiction.

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[1] This will be the correct reference if Additional Protocol No. 3 embodying the Guatemala Protocol comes into effect and is the reference used in this paper. The section is currently published as Article XIV of the Guatemala Protocol.

[2] The Prudential Insurance Company of America.

II. THE OPPOSING PARTIES

Oppositions to the Application have been filed by the Association of Trial Lawyers of America ("Trial Lawyers"), The Association of the Bar of the City of New York ("City Bar"), the Institute for Public Interest Representation of Georgetown University Law Center ("Institute") and the Aviation Consumer Action Project ("ACAP").

The Trial Lawyers and the City Bar, as their names indicate, are associations comprised of lawyers, including those who earn comfortable livings litigating cases arising out of air crashes. This is especially so in the case of the Trial Lawyers. They are, therefore, troubled by innovations in the method of compensating victims of air crashes that would minimize the need for their services or lessen their own compensation, as will be the case if Protocol No. 3 enters into force.

The Institute and ACAP are self-styled representatives of consumer interests. Although we do not challenge their right to comment on the Supplemental Agreement, we do not concede their credentials to speak for airline passengers any more than we concede that the lawyer groups are commissioned to speak in behalf of claimants.

III. STATEMENT OF GOVERNMENT AGENCIES

The Department of Transportation and Department of State ("Government Agencies") filed a joint Statement with the Board recounting the development of the Guatemala Protocol and Protocol No. 3 together with an account of the role of the United States Government in the development of the Supplemental Compensation Plan..

IV. SUMMARY OF THE OPPOSITIONS

As stated above, four organizations who oppose the Agreement have filed variously entitled answers to the Application. One of them, the Trial Lawyers, has also requested an evidentiary hearing and oral argument before the Board.

For the most part the objections reflect a distaste for the Warsaw Convention and Protocol No. 3 and seek to enlist the Board's support in preventing ratification of the Protocol. Some challenge the Board's jurisdiction over the Agreement and some express a preference for another type of Plan funded in another way. Others raise antitrust and constitutional objections to the Plan; and at least one of them would have the Board interject itself into international monetary policy.

We will address some of these contentions in due course. However, before doing so, it is important to be clear as to what is and what is not before the Board for decision. It is therefore important to discuss briefly the scope of this proceeding.

V. SCOPE OF THE PROCEEDING

It should be emphasized at the outset that the issue before the Board is to determine whether or not the Agreement itself is adverse to the public interest. It is not the Board's role herein to rule on the wisdom of the Warsaw Convention or Protocol No. 3.

The Warsaw Convention is a treaty to which the United States has adhered with the advice and consent of the Senate since 1934. Whether or not the United States should continue in that treaty is a decision to be made by the President. Similarly, the decision whether to ratify Protocol No. 3, which modernizes the Convention, is up to the Senate and the President, but not the Board. Since the Agreement is adopted pursuant to the Protocol -- to supplement recoveries limited by the Protocol -- it is obvious that it cannot come into being unless the Protocol comes into effect. Thus, the Agreement itself is conditioned on the coming into effect of the Protocol. See Agreement, Sec. 6.2(c).

The simple fact is this: if the Protocol comes into effect it, together with the Constitution and acts of Congress, will be the law of the land, binding on the Board and the general citizenry alike. It is, therefore, unnecessary to deal with the bulk of the opposition to the Agreement since, as aforesaid, it is directed against the Convention and the Protocol. This includes virtually all of the arguments advanced by the City Bar and a considerable number of the contentions of the Trial Lawyers.

For the same reason, the Board must reject at the outset the contention made by ACAP that the Board could, even if it were advisable to do so, require that carrier liability be specified in gold francs and converted into dollars at the market value of gold rather than the official value. As to the latter point the Board is not free to rewrite the treaty. See Sec. 1102 of the Federal Aviation Act. But, of course, the point is really academic. If the Protocol is ratified, the gold franc will be replaced by the Special Drawing Right ("SDR") as the unit in which carrier liability is expressed. In short, arguments over what the numeraire should be are outside the scope of this proceeding, just as the wisdom of the Protocol and the liability system it establishes are beyond its scope.

As for the Agreement itself, its benefits are expressed in U. S. dollars, the currency of the realm. ACAP is obviously mistaken when it says: "By the agreement at issue here a new standard would be established, i. e., the International Monetary Fund Special Drawing Right ('SDR')."[3]

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[3] ACAP Answer, p. 3

VI. LEGAL ARGUMENTS RAISED BY OPPONENTS

As indicated above, some of the answers to the Application have raised legal objections to the Agreement. Essentially they are that the Board has no jurisdiction over the Agreement, that the Agreement offends antitrust concepts, and that it is unconstitutional.

A. Jurisdiction -- Section 412 of the Federal Aviation Act

Only the Trial Lawyers contend that the Agreement is beyond the Board's jurisdiction. The Institute pretends to see antitrust violations (discussed below) which it believes compel disapproval, but does not question the Board's jurisdiction over the Agreement or the parties to it. The opposition of the City Bar (concerned, as aforesaid, almost exclusively with the Protocol and the tort system) does not raise a question of jurisdiction; nor does the ACAP filing.

The Trial Lawyers throw in the proverbial "kitchen sink" in attacking the Board's right to approve the Agreement. The core of their contention seems to be that since the benefits under the Plan are in the nature of "accident insurance", the Agreement somehow is outside the scope of Section 412. This is a curious argument coming from a party who quotes Section 412(a) in its entirety since the plain language of that section makes no such exception. Cutting through its wordage Section 412 mandates as follows:

> "Every air carrier shall file with the Board a true copy...of every...agreement...affecting air transportation...between such air carrier and any other air carrier, foreign air carrier, or other carrier...relating to the establishment of transportation rates, fares, charges or classifications...or for other cooperative working arrangements."

The Agreement is a cooperative working arrangement whereby air carriers (and foreign air carriers) have complied with the request of the U.S. Government to establish a privately operated Supplemental Compensation Plan as authorized by Article 35A of the Protocol. See the Statement of Government Agencies pp. 5-7. It is first of all an agreement among air carriers wherein they agree upon a charge to be included in the cost of an airline ticket. Each commits itself to publish that charge in its tariff and to collect it on all international journeys sold and beginning in the United States. It is also an agreement by each of them to transmit the proceeds to Prudential who in turn agrees with each of them to administer the Plan in accordance with the terms of the Agreement. See Agreement, Sections 1, 2, 3, and 4.

It stretches credulity to suppose that air carriers could enter into such an agreement imposing an agreed charge on airline passengers without being required to file that agreement with the Board. If they could do so without running afoul of the requirements of Section 412, then it would seem that no rate agreements, such as the rate agreements of the International Air Transport Association ("IATA"), need be filed for Board scrutiny. It is equally implausible to assume that the Board could meet its statutory duties by disclaiming jurisdiction over them.

There are a number of instances in which the Board has required carriers to file agreements less directly "affecting air transportation" than a charge imposed on airline passengers which Section 412 expressly requires the carriers to file. An example is the Board's order requiring the filing of the Articles of Association of the Air Transport Association (Order 704, October 25, 1940) and the Bylaws of its Conferences, 39 CAB 881, 886 (1964).

Nor has Section 412 jurisdiction been limited to agreements involving only airline parties. It is well known that in the Local Cartage Agreement Case, 15 C.A.B. 850 (1952) the Board assumed jurisdiction of an agreement (and disapproved it) where air carriers were contracting for local delivery services. Likewise, the Board's approval of the Air Traffic Conference ("ATC") Agency Resolution, which includes as part of it a sales agency agreement for execution in behalf of ATC carrier members and the travel agencies who sell air tickets, was upheld in *McManus* v. *Civil Aeronautics Board*, 286 F.2d 414 (2d Cir. 1961). See also *Beltz Travel Service, Inc.* v. *Air Transport Association*, 13 Avi. Cas. 17, 242 (N.D. Cal. May 31, 1974); *Grueninger* v. *Air* Transport Association, 1975-2 Trade Cases ¶ 60.601 (D.D.C. Jan 9, 1976): and *Fugazy Travel Bureau* v. *Civil Aeronautics Board*, 350 F.2d 732 (D.C. Cir. 1965).

This is not to say that contracts between airlines having nothing to do with passengers, travel, charges, air tickets and so on -- in other words agreements having nothing to do with "air transportation" -- are proper matters for Board consideration. We are not suggesting, for example, that an agreement between hotel chains owned by airlines must be filed for review and approval by the Board merely because the hotel chains are owned by airlines.[4] Nevertheless, the range of agreements covered by Section 412 is quite broad. Describing its breadths in the *McManus* case, the U.S. Court of Appeals for the Second Circuit said:

> "***It may well be that Congress did not intend to cover so broad an area by enacting §412, and that the airlines should not be permitted to exercise concerted control which is immune from antitrust regulation over some related industry such as that of ticket

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[4] Note the comments of the court in *Foremost* v. *Qantas*, 525 F.2d 281, 286 and 287.

> agencies. But there is no indication in either the words of the statute or in its legislative history that would justify our reading §§412 and 414 narrowly to insulate airlines from antitrust liability to other airlines only and not to protect it from suits by those engaged in affiliated services affected by an agreement among the airlines." 286 F.2d at 419

The Trial Lawyers take heart from the Ninth Circuit's disposition of Foremost v. Qantas, 525 F.2d 281 (9th Cir. 1975) where the Court of Appeals upheld a lower court's preliminary injunction against Qantas for antitrust infractions growing out of Qantas' alleged predatory practices relating to its entry into the tour business. But the court also upheld the District Court's order staying further proceedings pending referral of the matter to the Board, because of the Board's substantial involvement in it. 5/ Thus the Court of Appeals did not hold, as the Trial Lawyers allege, that the Board has no jurisdiction over agreements filed in accordance with Section 412 where a non-airline party is involved.

The Court of Appeals decision is subject to serious question because, in discussing the matter of primary jurisdiction and the extent to which

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5/ The case is now pending before the Board in Docket 27631 on a complaint against Qantas filed by Foremost alleging unfair and deceptive practices and unfair methods of competition within the meaning of section 411 of the Act. By letter of December 15, 1975 the Board's Bureau of Enforcement advised Foremost that it rejected one of the allegations of its complaint. On that same day the Bureau of Enforcement docketed the rest of its complaint in accordance with the Board's procedural rules. The matter has been assigned to an Administrative Law Judge for further proceedings.

the Board can confer antitrust immunity.[6] it appears to have read the Board's jurisdiction to confer antitrust immunity where non-airline parties are involved more narrowly than the Supreme Court did in Hughes Tool Co. v. TWA, 409 U.S. 363 (1973) or the Second Circuit did in McManus, supra. Thus while the dissenting opinion in Hughes Tool advanced the argument that Board orders must be restricted to the airline industry, the argument was rejected by the Supreme Court. The Court said:

> "We think the Court of Appeals erred also in construing and applying §414, which immunized from antitrust liability any conduct approved, authorized or required by any Board order issued under §408. As we read this record, the Board not only approved Toolco's ownership of TWA stock but it also contemplated actual and legal control of TWA by Toolco. ***" 409 U.S. at 386.

Moreover, the Foremost court seems to recognize that the primary anti-competitive effect is the thing to consider in regard to the Board's jurisdiction:

> "***A regulatory agency's approval of certain actions cannot confer antitrust immunity to those actions unless the primary anticompetitive effect those actions may have is limited to the industry in question." 525 F.2d at 286 (Emphasis supplied)

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[6] Section 414 provides: "Sec. 414 [72 Stat. 770, 49 U.S.C. 1384] Any person affected by any order made under section 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the 'antitrust laws', as designated in section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved or required order." (Emphasis supplied)

As already noted the "charge" agreed upon by the carriers is applicable only to airline passengers. This means that its principal impact will be on the air transport industry. If it has any anti-competitive effects at all on the insurance industry, those effects will be limited to the extent that airline passengers are involved.

As indicated above, the Foremost decision was premised on Qantas' entering an industry over which the Board had no control. That is not the case at hand. The carrier parties to the Agreement are not entering the field of insurance. Section 1.2 of the Agreement makes this clear by pointedly stating that "...no Carrier shall have any beneficial interest in any monies collected." This should allay any apprehensions that the carriers are competing with predatory intent or otherwise with any member of the insurance industry as Qantas was said to be doing in the tour industry by Foremost. [7] The Foremost decision therefore, has no relevance here because the facts are crucially different.

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[7] Although the Foremost court said that the tour industry was beyond the Board's control, its statement was tempered somewhat by the observation that the Board, "arguably has the means to enforce an order against Qantas should it so choose." 525 F.2d at 285.

It becomes clear that both the facts and the Board's power are crucially different when the rationale of Foremost is applied to the Supplemental Agreement. After saying that the Board lacked authority over all the parties the court in Foremost added:

> "***It may well lack the means to deal with the total problem. But more importantly, the regulatory agency here also lacks the expertise and the incentive (-after all it is not its industry-) to act on an inter-industry problem. There is the danger that in cases such as this the regulatory agency might favor its own regulated industry at the expense of non-regulated commerce, or at the very least, might consider the resolution of such matters to be of a less pressing priority."
> 525 F. 2d at 285. (Court's emphasis)

The court's concern thus appears to have been that the Board did not have the "expertise", "incentive" or "means" of coping with Qantas' foray into the tour business. But if these were shortcomings in the factual situation there, those shortcomings are certainly not present when the question becomes: "Can the Board cope with Prudential's nexus with the air transport industry arising out of its agreement to administer the Supplemental Plan in accordance with the instant Agreement?"

Determining whether rates and charges are reasonable is one of the reasons the Board was created and its experience in doing so goes back to 1938. By any test this adds up to "expertise". If statutory "incentive" is needed, the requirement that the public interest be considered in passing on 412 agreements supplies it. The "means" are clearly available through the power to disapprove the Agreement in the first instance or upon subsequent review;[8] the right to condition its approval of any agreement;[9] and its continuing oversight in all cases where approval has been granted.[10] These things considered, it is apparent that jurisdiction over the insurance industry in general or of Prudential's affairs in particular are not necessary to permit the Board to make certain that the Supplemental Plan serves the public interest. For example, if the Board concludes that the charge is too high it can disapprove the Agreement outright or approve it on the condition that it be reduced. If the Board is convinced that the formula for adjusting the rate lacks sufficient flexibility or is not sufficiently conservative for the stability of the Fund it has the "means" of coping with the problem by imposing appropriate conditions.

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[8] Hughes Tool Co. v. TWA, 409 U.S. 363 and McManus v. CAB, 286 F.2d 414 at 419.

[9] McManus at 419 and National Air Carrier Association v. CAB, 436 F.2d (D.C. Cir. 1969) 185, 190.

[10] See Hughes Tool Co. v. TWA where the court made the following observation:

> "It seems sufficiently apparent, therefore, that the Board did not exhaust its powers with respect to Toolco's control of TWA when it issued its order of approval in Docket No. 1182 in 1944. Obviously, the Board remained competent to enfore (sic) or to waive the conditions attached to that order. It did so many times." 409 U.S. at 383.

In sum: The Agreement has a substantial effect on air transportation rather than a peripheral or incidental one. On the other hand, its impact on the insurance industry is slight, if indeed it will have any impact; and there is no reason to believe that the Board, in order to see that the Agreement serves the public interest, will become obligated to police the commercial relationships and practices of Prudential or the insurance industry. Cf. Orders 70-3-22 and 70-7-99 approving an agreement between named airlines and Societe Preparatoire Pour Air Transport Insurance, S. A., establishing two industry-owned insurance companies.

B. Antitrust and Constitutional Contentions

1. Antitrust Contentions

It is, of course, not necessary to remind the Board that inconsistency with antitrust principles need not be fatal to carrier agreements. Such agreements may nonetheless be approved by the Board. So simply alleging an antitrust violation, as the Institute[11] and the Trial Lawyers do, is not enough. On the other hand, the Board is not and should not be indifferent to the antitrust laws and should not push them aside promiscuously. Nor it is the Board's policy to do so.

In the *Local Cartage Case* the Board defined a sensible procedure to be followed in those cases in which antitrust questions are raised. If a carrier agreement is "plainly repugnant" to established antitrust principles, the Board will not approve it in the absence of a "showing that the agreement is required by a serious transportation need, or in order to secure important public benefits."[12]

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[11] Even the Institute seems to have doubts about it. On page 4 of its answer it states: "The plan constitutes a tying arrangement which runs the *grave risk of being illegal* under the U.S. antitrust laws.[*] (Emphasis supplied, footnote omitted.)

[12] 15 CAB 850, 853 (1952)

The first step, therefore, is to evaluate the allegations in order to determine the magnitude of possible infractions. Only if infractions are apparent and significant does the stricter *Cartage* test become applicable.

The Institute claims there is a "tying" agreement, that the sale of air transportation is tied to the purchase of insurance, and argues that this requires disapproval of the Agreement. The matters of "serious transport need" and "important public benefit" are simply ignored. The contention lacks merit.

The Supplemental Agreement is not a tying agreement by any test. Two elements are required to establish a "tie". First, two separate products or services must be involved. If there is only one basic product with merely an ancillary service the allegation fails and it is unnecessary to inquire further. If it is established that there are two separate products it then becomes necessary to show that the "tying arrangement involves a seller who not only competes in the tying item's line of commerce but participates *for profit* in the area of competition to which the tied item belongs." *Crawford Transport Company* v. *Chrysler*, 338 F.2d 934, 938 (6th Cir. 1964). (Emphasis supplied) See also *ICEE, Inc.* v. *John E. Mitchel Co.*, 1973-2 Trade Cases ¶74,681, fr. 94,989 (D.Ore. 1973), *cert. denied*, 380 U.S. 954 (1965).

In this instance the product is air transportation for which an airline ticket must be purchased. The charge here is part of the overall cost of that ticket, as is the cost of a meal or the airlines' own insurance costs. In other words, it is one of a number of charges (some direct, others ar[illegible]ary) included in the cost of the ticket. The fact that it is c[illegible]lsory and separately stated alters nothing. See *Washington Gas Li[illegible]o.* v. *Virginia Electric & Power Co.*, 438 F.2d 248, 253 (4th Cir. 1971). See also *International Manufacturing Co.* v. *Landon, Inc.*, 336 F.2d 723, 730 (9th Cir. 1964), *cert. denied*, 379 U.S. 988 (1965).

Assuming that the charge were regarded as the price for a separate service, a forbidden tying agreement cannot be established unless it can be shown that the airlines are *competing for profit* against insurers, none of whom we note are here contending it. In any case, the language of the Agreement gainsays both points. Section 1 of the Agreement spells out the limited role played by the airlines and precludes the possibility that they will obtain a profit or other monetary gain.

Finally, even if the Plan is construed to involve a tie-in, it can be justified as reasonable under the antitrust laws because the Plan was initiated by the Federal Government for the benefit of the traveling public. Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 68 (4th Cir. 1969), cert. denied, 397 U. S. 920 (1970); United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 560 (E. D. Pa. 1960), aff'd per curiam, 365 U.S. 567 (1961).

The Trial Lawyers cry restraint of trade and monopoly. Their antitrust complaints seem to be that the charge is beyond marketplace influences and that Prudential will get a substantial share of the "international aviation death/accident" insurance market because of the Agreement and will gain an unfair advantage over competitors because of "public exposure".

As to the argument that the charge is not influenced by market forces, it is submitted that the stringent guidelines built into the Plan (e. g., the limited retention allowed the Contractor[13/] and the formula for automatically adjusting the charge, based on experience[14/]) are aimed in the same direction as any wholesome market force is aimed -- i. e., a reasonable charge to the airline passenger. It is, therefore, reaching far out for an argument to equate the technical absence of a market force with "elements which are clearly repugnant to established antitrust experience." Local Cartage Case, supra at 853.

[13/] Paragraph 2.3 of the Agreement.

[14/] Paragraph 4.2 of the Agreement.

The Trial Lawyers assert that Prudential will deprive insurance companies of a substantial international market and will thus effectively monopolize that market. The only suggestion as to how this will be accomplished is that passengers, when they learn the purpose of the charge, will not purchase "alternate coverage". The Trial Lawyers are caught in a contradiction here. Their argument made elsewhere that the overall limit of the new Warsaw system (approximately $317,000) is woefully inadequate discredits their assertion that passengers will be so pleased with this limit that they will not purchase additional coverage. But even if the Board is disposed to let them have it both ways, the monopoly argument is undercut by the fact that purveyors of "alternate coverage" would presumably be harmed even more if, as the Trial Lawyers suggest, liability under the Plan should be unlimited or the Warsaw Convention denounced. The fact remains, however, that vendors prosper domestically where there is no limit on recovery against the carrier. If there will be any deprivation of the international insurance market attributable to the Plan, it will not be of sufficient magnitude to outweigh the substantial benefits to the traveling public which the Plan provides.

It is hard to take seriously the assertion that Prudential's public exposure attributable to the Plan exhibits a "predatory intent". The only conceivable document we can think of with any significant distribution that might mention Prudential would be the notice which will advise the public of the Supplemental Plan. If this is perceived by the Board as a threat, it can be "nipped in the bud" by specifying that the notice not mention Prudential by name.

Before getting to its three antitrust objections, the Trial Lawyers suggest that the Agreement is repugnant on its face -- that it is a non-competitive "contract" between the airlines and Prudential. This is just not so. While it is true that Prudential is the only Contractor under the Agreement, there is no provision in the Agreement restricting participation to Prudential. On this same score we refer the Board once again to the account set forth at pages 7-10 of our Comments In Support of the Application of the steps taken to interest parties in operating the Plan. We stress once more that, despite identical advertisements in The Wall Street Journal and The Journal of Commerce, individual letters sent to the insurance community and a special meeting in the auditorium of the Federal Aviation Administration in Washington at which time explanation of the Plan was made by airline and

Government representatives, very few individuals or organizations were interested in serving as Contractor. As said in our Comments, the basic problem was that those who expressed an interest were reluctant to take the risks involved without a chance of making a reasonable profit if experience were good.

Against this background, it is hard to see how the Board could ascribe a "predatory" intent to Prudential or become troubled by assertions that the Agreement is repugnant to antitrust laws because it is a non-competitive contract. Should the Board find failure to have more than one participant as Contractor a bar to approval of the Agreement, its course is clear -- it may require inclusion of an express provision that other companies may participate. See Attachment "A", pp. 2 and 15.

As demonstrated above, none of the antitrust arguments make the case that the Agreement is "plainly repugnant to established antitrust policy principles." Ergo, the Agreement must be approved unless it is found adverse to the public interest -- it is unnecessary to make the showing required by Local Cartage that the Agreement is required by a "serious transportation need" or "to secure important public benefits". Nevertheless, as will be shown in discussing the public interest, the Agreement will meet this requirement.

2. Constitutional Contentions

Even the Trial Lawyers appear to recognize that the Agreement does not really threaten American liberties. So in reaching for a Constitutional-argument, they link it to the Protocol. As in the case of their lament for competitive insurance companies discussed above, the Trial Lawyers, cognizant that their own interest in personal injury cases is not constitutionally protected, presume to speak on behalf of passengers, manufacturers and the Government (Air Traffic Control) -- none of whom has seen fit to complain.

The Constitutional argument is ill-conceived and has no factual or legal support. There is just no way that the Agreement or the Plan denies anyone due process of law; nor, we submit, does the Protocol, the fate of which is up to the Senate. All the Agreement does is to establish a Plan that will permit claimants, who can show that they deserve more recompense than the Protocol allows, to get more.

Next in the dragnet of contentions is the equal protection clause. This argument goes: the carriers' liability is limited but the liability of the manufacturers and the Government is not.

This is pure Protocol talk since the Agreement does not limit carrier liability.

The Trial Lawyers have cited no case suggesting that the new Warsaw system -- which establishes a uniform regime of law guaranteeing certain and speedy recovery in aviation crash cases and permitting supplemental benefits above the liability limit it fixes -- violates the equal protection clause of the Constitution. The cases which they did cite are not in point. Schneider v. Rusk,[15] a due process case dealing with the question of possible loss of American citizenship, certainly does not prohibit any type of classification that may be established by the Agreement or the Protocol. And all that is said in Department of Agriculture v. Moreno[16] is that a classification must be related to a "legitimate governmental interest". The Supreme Court has said nothing which suggests that "legitimate governmental interest" can be established only by statute. The assertion that the Agreement must be examined in the perspective of the original purpose of the Warsaw Convention (financial protection for an infant industry) presumably is intended to cast doubt on the

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[15] 377 U.S. 163 (1964).

[16] 413 U.S. 528 (1973).

"legitimate governmental interest". Governmental interest is dealt with adequately in the Statement of the Government Agencies, particularly at pp. 4, 5 and 10 setting forth the raison d'etre of the new Warsaw system.

We come now to the most preposterous assertion of them all -- that the Agreement denies citizens their constitutional right to travel. The cases cited to support this extraordinary claim are woefully wide of the mark. Kent v. Dulles [17] and Aptheker v. Secretary of State [18] both involved denials of a passport to individuals -- Kent because of a refusal to file an affidavit concerning membership in the Communist Party; Aptheker in accordance with requirements of the Subversive Activities Control Act. The Supreme Court halted these inroads on American liberty for the obvious reason that denial of a passport would impinge on the right to travel, if indeed it would not prevent it.

There is no comparability, legal or factual, between those cases and the "charge" contemplated by the Agreement. Air carrier tariffs imposing fares and charges can hardly be regarded as "penalizing" the exercise of the right to travel in the sense that a twelve month residency requirement preventing an indigent from receiving medical care was said to do in Memorial Hospital v. Maricope County [19] cited by the Trial Lawyers.

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[17] 357 U.S. 116 (1958).

[18] 378 U.S. 500 (1964).

If an additional charge to be paid by air travellers denies the right to travel, so does the basic fare. This would mean that the Government would be required either to nationalize all common carriers or otherwise arrange to provide gratis service to stay on the right side of the Constitution. Enough time has been spent on this point; the argument is frivolous.

VII. THE PUBLIC INTEREST

As stated above, the Supplemental Agreement was devised at the request of the U. S. Government and complies with the requirements of Article 35A and the guidelines established by the Government. We submit that it is wholly compatible with the public interest, will achieve many important benefits for the traveling public and should be approved by the Board.

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[19] 415 U.S. 250 (1974).

A. No-Fault Supplemental Benefits

The Board must view the Supplemental Agreement, as it did the Montreal Agreement, as offering something to the travelling public which it would not have in the absence of the Agreement. In this case, it is an assurance that benefits up to $200,000 above the limit imposed by Protocol No. 3 are available without proof of fault once it is shown that the carrier limit has been exhausted. Apart from the economic savings inherent in such a system, which we will discuss below, this assurance will be of great benefit to claimants at a time of considerable anxiety. This is a consideration that should not be minimized in passing on the Agreement.

The Board has previously recognized the virtues of a no-fault system for compensating victims of air crashes. This was done in approving the Montreal Agreement which included the following among its provisions:

> "(2) The Carrier shall not, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, avail itself of any defense under Article 20(1) of said Convention or said Convention as amended by said Protocol.

> Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding, or other bodily injury of a passenger." Agreement CAB 18990.

In its order approving that agreement, the Board concluded that the provision dispensing with the requirement of proving fault (waiving defenses) met the public interest requirements of the Act. Order E-23680 (May 13, 1966), p. 3. The benefits available under the Supplemental Agreement are more substantial than those offered by the Montreal Agreement and, as we will show, are virtually automatic which means that considerable time and money will be saved as the amount of litigation is reduced.

B. Level and Speed of Recovery Under the Agreement

As aforesaid, the Agreement facilitates an overall recovery of up to $317,000 by providing an additional $200,000. Although the exact limit of carrier liability will vary slightly from time to time depending on the value of the U. S. dollar in relation to the SDR, the benefits under the Agreement are expressed in dollars and will remain constant unless the limit is revised. The maximum compensation available under the Agreement alone is more than two and a half times the Montreal limit and the overall system limit is more than four times Montreal. The overall limit also compares favorably with domestic recoveries where there is no limit.

As shown in the Board's updated survey of recoveries[20] (1970 through the first six months of 1974), 84 percent of the non-Warsaw recoveries for death were less than $300,000 and 91 percent were less than $300,000 in injury cases. The survey has not yet been updated to reflect the elapsed time between the date of the accident and the date of the settlement. (The word "settlement" includes recoveries as a result of litigation as well as agreed settlements.) But a good indication of the pace at which the tort system operates can be gleaned from the CAB "Settlement Survey" covering settlements with respect to accidents occurring in the period 1960 through 1963.[21]

In the recovery range of greatest concern for present purposes, those between $100,000 and $300,000, only 61 percent of the claims were settled within four years and only 69 percent within five years. CAB Settlement Survey, Table III(A). In the range between $300,000 and $500,000, only 15 percent of the claims had been settled within five years. In the $75,000 to $100,000 range, 20 percent of the claims remained unsettled after five years.

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[20] Levels of Recoveries on Account of Passenger Deaths and Serious Injuries in Airplane Accidents--1974 Study (dated January 1, 1975).

[21] Civil Aeronautics Board, Levels of Recoveries on Account of Passenger Deaths and Serious Injuries in Airplane Accidents (covering settlements with respect to aircraft accidents occurring in the calendar years 1960 through 1969), Tables III (A) and (B) for the period 1960-1963.

Table III(B) of the Settlement Survey shows the average time required to settle in the respective recovery levels. It reveals that the average time required to reach settlement of claims above $100,000 was 4.2 years. The average time was 5.4 years for claims exceeding $200,000, 6.5 years for those over $300,000 and 3.6 years for those exceeding $500,000.

As noted above, most of the non-Warsaw recoveries through the first six months of 1974 have been below $300,000. This fact alone attests the public interest in an agreement permitting an overall recovery of some $317,000. But that is not all. The time required to receive the settlement must be factored in to assess the net benefit of the Supplemental Compensation Plan to claimants. We realize that in future cases it is possible that some claims may be settled earlier than reflected in the Board's Survey and that some will take longer. However, in cases where proof of fault is involved and where there is no time limit, there is little likelihood that many settlements will be made within six months as is likely to be the case under the new regime.

Article 22, 3.6 b) of the Amended Warsaw Convention 22/

22/ Article VIII of the Guatemala Protocol.

contains a so-called "settlement inducement clause" subjecting carriers to costs (including attorney fees) over the Protocol limit if an offer equal in amount to the ultimate award is not made within six months after a claim is filed. In addition, Section 3.6(b) of the Agreement obligates the Contractor to make payments "not more than sixty (60) days after its receipt of proof of its obligation to make such payments." Thus in most cases under the new system settlements are likely to come within six months. This will improve the claimant's net position significantly. This fact can be seen by comparing the result of investing a settlement for a period equal to the difference between the average time required for settlements under the new system compared with the current tort system for non-Warsaw cases. Based on the settlement lags referred to above, this difference in time will be about four years on the average. Currently, investment in high-grade bonds yields approximately 8 percent annually. The investment of $317,000 at this rate produces a total of capital and interest at the end of four years of about $430,000.

Another factor to be considered in determining public interest in a no-fault system designed to maximize net recoveries is that such a system should substantially reduce both the amount and complexity of litigation, thereby lessening the role of the lawyer as well as the of the recovery that must be shared with him. Indeed, it may be that many claimants will not need a lawyer. Even in the few cases where damages may be contested there will be no need for the specialist who is expert in such things as conflict of laws and proving negligence in aviation cases, whose services are of high quality -- and high cost.

Eliminating the risks of proving negligence and lessening the role of the lawyer will also reduce the impact of contingency fees upon claimant recoveries. Contingency fees, of course, vary from time to time and place to place. One third is the figure often mentioned. Some may be higher and others may be lower. To illustrate the advantage to a claimant of a virtually automatic system where the lawyer may not be needed, if the fee is calculated at 30 percent a $500,000 recovery is cut down to $350,000 -- just a little more than the limit of the supplemental system. If the fee is more, of course, the claimant's take home recovery is further reduced.

A carrier agreement permitting reasonable recoveries which are likely to be received by claimants within six months must be viewed as making a major contribution to the public interest.

C. Unlimited Medical and Hospital Benefits

Another aspect of the Agreement, ignored in most of the answers, is contained in Section 3.5. It provides for unlimited payment by Prudential of hospital and medical benefits as they come due.[23] The skyrocketing cost of hospital and medical care is common knowledge today and it probably has touched every participant in this proceeding. The hospital and medical benefits provided by the Agreement run to those who need them most, to passengers who are seriously injured and who require long, and in some cases indefinite, hospitalization.

The conclusion is inescapable that a seriously injured survivor is better protected under a system whereby his hospital and medical bills are reimbursed in full than he is as a recipient of a spectacular judgment which he must share first with inflation and then with attorneys and other specialists needed to obtain it.

This feature must surely be counted as one of the "important public benefits" of this Agreement. It is in the public interest.

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[23] See Comments in Support of Supplemental Compensation Agreement (December 31, 1975), pp. 17-19.

D. Cost of Supplemental Benefits

When the anticipated frequency and level of claim payments under the Agreement are taken into account, it is apparent that the initial charge of $2.00 is a reasonable charge. Although some of the parties filing answers have suggested that it is excessive (e.g., the Trial Lawyers) none has given any valid reasons for such an assertion.

The charge must bear directly on experience. Since the Plan has had no experience of its own it is necessary to calculate the initial charge on the basis of whatever experience in the airline industry is relevant and to make informed judgments as to how that experience relates to coverage under the Plan.

A review of the experience of the airline industry in recent years provides a basis for estimating that the frequency of claims for flights subject to the Plan will be about 1 in 80,000 passengers.[24] A similar review of this experience indicates that the average size of claims which may be expected to be made against the Plan is in the range of $96,000 to $126,000. These amounts, however, do not take into consideration the fact that the very existence of the Plan and public awareness of the extent of the coverage which it provides may be expected to result in greater average amounts of claims. The requirement of the "Notice to Claimants" described in Section 2.4 of the Agreement and the notice to passengers which will be included in airline tickets will ensure this public awareness. It is, therefore, to be expected that the average claim will be greater than those described above and may reasonably be assumed to be in the neighborhood of $140,000. After allowing for expenses and taxes the resulting charge required to pay this average claim is $1.88.

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[24] Section 4.3 of the Agreement.

Another factor to be taken into consideration in establishing the initial charge is the requirement of building a positive balance in the Supplemental Compensation Fund.[25] The reason for building this positive balance is to cushion the impact of substantial claims and to dampen the degree of fluctuation in the level of the charge.

Considering all of these factors it is reasonable to set the initial charge at $2. A detailed commentary on the derivation of the initial charge is set forth in Attachment A to the Consolidated Reply.

It should further be noted that once the Plan is in operation the charge will vary according to actual experience so that any excess or deficiency in the charge will automatically be adjusted. This automatic adjustment feature and the limited retention allowed the Contractor under the terms of the Agreement are specifically designed to ensure that the charge is maintained at a reasonable level and that the maximum possible portion of charges collected is paid to claimants in the form of benefits. A plan providing the significant benefits discussed above, to be received speedily, with minimum resort to litigation and the expenses associated with it, must be counted as securing an important public benefit. When these facts are considered it becomes apparent that an initial $2.00 charge with an automatic formula to adjust it to experience, is a very reasonable charge, wholly commensurate with the public interest.

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[25] Section 4.3 of the Agreement.

VIII. CONCLUSIONS

The Supplemental Agreement is a carrier agreement subject to the Board's jurisdiction and control in accordance with section 412 of the Federal Aviation Act. It was devised at the request of the United States Government and complies with Article 35A of Additional Protocol No. 3 to the Warsaw Convention and the guidelines established by the U.S. Government.

The benefits to claimants provided by the Agreement are substantial and the cost of funding the Plan established by it is reasonable. The Agreement is part of a system establishing uniformity and guaranteeing speedy recovery to claimants at adequate levels. In addition, the Agreement provides unlimited medical and hospital benefits to those who need them most.

Thus the Agreement secures truly important public benefits. It is, therefore, in the public interest and must be approved in accordance with the requirement of section 412 of the Act.

WHEREFORE, the above premises considered, it is respectfully requested that the Board approve the "Agreement to Establish Supplemental Compensation Plan Pursuant to Article 35A of the Warsaw Convention as Amended at The Hague, 1955, at Guatemala City, 1971, and by the Additional Protocol No. 3 of Montreal, 1975."

Respectfully submitted,

/s/ Paul R. Ignatius

Paul R. Ignatius
President
Air Transport Association
of America
1709 New York Ave., N. W.
Washington, D. C. 20006
Attorney in Fact

February 20, 1976

ATTACHMENT D

OPTIONAL FORM NO. 10
JULY 1973 EDITION
GSA FPMR (41 CFR) 101-11.6

UNITED STATES GOVERNMENT

Memorandum

TO : M.D.L. Panel

DATE: April 28 , 1978

FROM : Peirson M. Hall, Sr. Judge

SUBJECT: Status M.D.L. No. 172

I expected to file a report in September, 1977, but put it off in the hope it could be a final one. But, due to circumstances which hereafter appear, I have delayed so that this is not yet a final report----but almost! (I hope.)

Attached is a 33 page statistical analysis. The summary is on the front page. The analysis does not disclose the number of the case or identification of the decedents or claimants by name, for the reason that all stipulations for, and approval of settlements are in camera until further order of court, at the parties request. In fact, it is a necessity to do so, to prevent the parties from playing one settlement against the other. Compensatory damages are peculiar and personal to each case. The statistical table does show the following detail: 1) age and sex of decedent; 2) defendants; 3) number of claimants and relationship; 4) those who waived all claims and relationship; 5) date of settlement; 6) total amount of settlement; 7) costs; 8) attorney's fees; 9) net

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distribution and relationship to decedent. I do not believe that this had been done before.

Only 211 suits were filed, but they involved 340 decedents (of the 346 total killed), and 1123+- claimants, residing in 36 foreign and domestic jurisdictions.

Quite early in the proceedings the case fell into two groups on the question of liability; those who waived punitive damages and those who refused to waive punitive damages. Some waived punitive damages promptly, others later. The heirs of 61 decedents, 46 of whom were Japanese, and 13 Turkish (the crew), waived punitive damages later and settled. But the issue is still alive in 2 cases, one American (Kalinsky)[1]; and, one contested settlement (Lux).

After an Order for severance of liability from damages, all cases were consolidated as far as liability was concerned. But, each of the 340 different decedents' cases had to be handled as a separate case as far as damages were concerned. Discovery on damages was required to be made right along with discovery on liability. Due to the many jurisdictions, discovery on damages grew to be almost as burdensome as discovery on liability. And, a few required a court trial on the question of distribution, which must be done by the judge under California law. Fortunately, we were not (yet--at least) plagued with attorney's fee quarrels.

There were many substantive law questions, the decision of which, required many days of argument and sometimes

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[1] On the trial of compensatory damages before Judge Real, Kalinsky got a verdict and judgment for $25,000.00.

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trials on the merits. Eight formal opinions concerned questions which were sufficiently novel to justify publication. They concerned:

1) only those portions of depositions actually used in trial are public--and then not until used, 387 F.Supp. 189, 12/2/74;
2) choice of law on damages, 399 F.Supp. 732, 8/1/75;
3) separate trials, 69 F.R.D. 310, 11/20/75;
4) punitive damages (1st opinion--Hall), 410 F.Supp. 326, 2/23/75;
5) statute of limitations in decertified class action, 428 F.Supp. 770, 1/19/77;
6) instruction on compensatory damages, 423 F.Supp. 367, 10/1/76;
7) punitive damages (2nd opinion--Hall and Real), 427 F.Supp. 701, 2/10/77; and
8) suicide from grief not recoverable, 428 F.Supp. 1074, 3/22/77.

About a hundred other written or minute orders have been made, many on contested questions requiring hearings. A hearing (a trial in fact) has just been set on 2 fact questions, (a) was there an agreed settlement, and (b) who is entitled to it.

From the beginning the court attempted to move the parties toward settlement, not only by a rigid course of discovery, but by conferences and the like. At the end of the 2nd year after the crash, only one case had been settled. I then established 3 panels of 3 retired California State judges to each panel to sit as Special Masters for evaluation purposes, but no authority to take evidence. And, I transferred to them all the cases which, to that date, had waived punitive damages. They were to hear each side and evaluate the case, and if agreed to, the report was signed by the masters and counsel for each side. In 3 months time the masters heard 232 cases with a total settlement figure of over 44 million dollars. Their cost was $12,500 a week for fees and expenses which was advanced by the defendants. They did a prodigious and astonishing job.

Their work "broke the back" for settlement of the cases which had waived punitive damages.

By the early fall of 1976, an agreed total settlement figure had been reached in each of the cases involving 241 of the 340 decedents leaving 99: 44 of which waived punitive damages and an agreed settlement figure was reached a few months later, the remainder of 55, consisted of 46 of the 48 Japanese cases, 8 of the 13 crew cases (Turkish), and one other,

persisted in the refusal to waive punitive damages. A trial appeared to be necessary on the issue of liability which would cover the admission of all evidence going to the question of willfulness which would go to the heart of Warsaw and the right to recover punitive damages. The Court ordered the parties to submit an agreed pre-trial Order. They did. It was 1500 pages of contentions. The Court rejected it and ordered them to try again, which they did several times, but still mostly contentions, and unsatisfactory."

The proposed pre-trial Order of 1500 pages presaged that the trial on the issue of liability would not only be long, but probably acrimonious and difficult because of the factual issue of willfulness, etc., necessary to be tried in order to determine not only questions of punitive damages as to the defendants, but also whether or not Warsaw-Montreal (Treaty) did or did not factually limit the liability of Turkish Air Lines, the defendant carrier, to $75,000.00. (The status of defendants' cross-claims against each other is discussed later.)

Then on November 15, 1976, with the previous agreement of the judges concerned, the M.D.L. Panel reassigned M.D.L. No. 172 to myself and Judge Real jointly. By tacit agreement between us, we agreed that we would sit together, where appropriate, but if not, the jury trials would be handled by Judge Real and all other matters (i.e., settlement, peripheral disputes and the like) would be handled by Judge Hall.

On February 10, 1977, Judge Real and I joined in an Opinion (427 F.Supp. 701) holding that the denial of punitive damages in death cases under California law was contrary to the equal protection clause in both the United States and California State Constitutions and certified the question for appeal under 28 U.S.C. 1292(b). It is pending on appeal.

Judge Real persisted in holding to an early and firm trial date on the issue of liability, notwithstanding the appeal, and, in spite of carrying a full and heavy civil and criminal calendar. As a result of that insistence, and his talents of persuasion, all parties involved in the punitive damage question (55 decedents) agreed that Judge Real could, notwithstanding the appeal, proceed with the trial of compensatory damages.

Accordingly, Judge Real set down 4 of the Japanese cases, and the Turkish cases for the trial of compensatory damages. He proceeded to try them, but before the recordation of the verdicts in each instance, the parties waived punitive damages and agreed to a settlement of compensatory damages and a waiver of punitive damages in all the crew cases and all the Japanese cases, leaving only 2 of the 340 decedents' cases pending on appeal on the question of punitive damages.

Ther are, however, 4 proceedings on Appeal, involving 5 decedents and 6 numbered cases of this Court. One appeal, involving 1 numbered case of this Court and 2 decedents, is the Kwoen case, where the jury verdict of $1,509,950 is the issue. One involves 1 decedent, and raises the question of the rights of a so-called "common-law"wife. And, the other 2 appellate proceedings are concerned with the right to recover punitive damages in a death case under California law.

The settlement papers and proceedings have not been concluded as to 18 decedents involved in 19 cases. Peripheral questions may arise (disputes over distribution methods, the handling of foreign and minors' awards; attorney's fee disputes [bad] and a variety of others).

Two writs were granted by the 9th Circuit. But, we managed not to let them slow down the progress of the cases, for two reasons: 1) from the very beginning the Court in the interest of due process and for obvious practical reasons required the Clerk to send Notice of all proposed hearings or motions to everybody who could possibly be interested or affected, and continued to do so after the Circuit issued a writ prohibiting the Court from requiring the defendants to file a complete list of decedents, claimants and counsel known to defendants; 2) disputes concerning attorney's fees for the Court's committee of lead counsel were avoided because each member of the committee was content to rely upon the fees generated from his own cases.

Notwithstanding the opinion of the Circuit the case was handled as a class action on liability, without calling it that. There simply was no other way to do justice to the parties or avoid years of delay.

A word of commendation must be said for those members of the plaintiffs' committee, in holding their fees to about 17% and under, (one group of lawyers held to a uniform 12 1/2%); in doing the prodigious job of discovery which generated the settlements paid, which was in fact, a windfall to lawyers who had fewer cases where the Court was required

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in some instances, to recognize a contractual claim for fees of as high as 1/3; and lastly, but not least, in advancing out of their pockets, costs of about 2 1/4 million dollars.

I am reliably informed that the four groups of lawyers who had large blocks of cases, secured those cases as a result of counsel, in the foreign countries involved, organizing the claimants into groups which in turn interviewed various American counsel and made their choice. The so-called "race-to-the-courthouse" appeared to have no effect on choice of counsel. And the methods used by counsel with the claimants resulted in a saving to claimants of the difference between the usual 1/3 plus costs, to about 1/7 +- plus costs, which in dollars here comes to around 10 million dollars more to the plaintiffs. The "ambulance chasing" and "race-to-the-courthouse" are unworthy epithets in this case.

The defendants, Turkish Air Lines, McDonnell Douglas and General Dynamics filed cross-claims or third-party complaints against each other for contribution or indemnity, together with responsive pleadings, which by stipulation were deemed to be filed in all cases. All proceedings therein were stayed in January, 1975, until further order of the Court. Conceivably, the whole question of liability in all cases may yet be required to be tried. California has now adopted comparative fault in contribution and indemnity cases which may, or may not, affect the defendants' desire to proceed on their cross-claims. My last communication from defendants' counsel indicated no desire to dismiss the claims between them, but to stay the proceedings further. My guess is that they want to see the outcome on appeal of the punitive damage question. If Judge Real and I are affirmed, the defendants will probably quit the business of just "finger-pointing" and seriously set about trying the issue of punitive damages, which will require an estimated 6 months trial time.

The actual jury trial time of Judges Hall and Real was 36 days. The docket sheet covers more than 150 pages and no effort has been made to count the court hearing days, other than trials. It was probably in excess of 100, during 3 1/2 years time, to say nothing of informal, un-reported hearings.

The Deputy Clerk assigned to me throughout this Case, and the Air Alaska Crash cases, the Duarte Crash cases, the Air Canada Crash Cases, the Hong Kong Crash cases, the Pago Pago Crash cases and the General Dynamics cases has been Mrs. Thelma Alden. She has literally been invaluable. She checked and re-checked an incredible number of documents, including all the settlement papers showing the dollar distribution and recipients in each case. She was intimately familiar with all proceedings and well acquainted with all counsel and their respective secretaries. She clerked for Judge Real in his trial of compensatory damages, and for more than 5 months has been the Courtroom Clerk for Judge Byrne in his trial of liability and damages in Pago Pago. If there were such a position as that of an expert Clerk following air-crash cases, she should be it.

I would like to suggest that carrying these crash cases by a judge who must constantly jump from "pimps to patents" and the other incessant and unpredictable demands of a full civil and criminal calendar on his time, makes it desirable that such cases go to senior judges. Thus, enabling the parties to get the attention and disposition of the many unexpected things which must be done promptly to keep these cases moving.

The Manual on Complex Litigation is an invaluable handbook.

The appointment of a committee of plaintiffs' lawyers is a must----even if this Circuit refuses to recognize the need to pay them.

Above all, the Judge must take charge of the case. And in doing so be guided, not by what is specifically permitted by Rule or Statute but do what is not prohibited as long as constitutional rights are preserved and the case moves forward.

It has been a great experience (and, maybe I'm not through with it yet).

Respectfully,

Peirson M Hall

Peirson M. Hall

Enclosures

Air Transport Association ata OF AMERICA

1709 New York Avenue, N.W.
Washington, D. C. 20006
Phone (202) 872-4000

JAMES E. LANDRY
Vice President and General Counsel

September 2, 1977

Honorable John J. Sparkman, Chairman
Committee on Foreign Relations
United States Senate
Washington, D.C. 20510

Re: Foreign Relations Committee
-- Ratification of Montreal
Protocols 3 and 4

Dear Mr. Chairman:

Upon my return from vacation this past Tuesday afternoon, I found among my incoming correspondence a copy of Mr. Kreindler's letter to you, dated August 17, concerning the above subject matter. In that letter, Mr. Kreindler repeats a number of contentions previously made by him and other members of the claimants' bar in connection with Montreal Protocol No. 3. He also accuses the Air Transport Association of making falacious and misleading arguments to some members of the Foreign Relations Committee. But for the assertion that we are spreading misleading information, I would not burden you with a reply since, as I have indicated, there is little in Mr. Kreindler's contentions that has not been previously set forth in testimony before the Committee and, perhaps, in other submissions to Committee members by Mr. Kreindler and others who share his point of view.

With regard to "Jurisdiction, Venue and Choice of Law", it may be true that some American courts, in some cases, have been persuaded to apply their own substantive law in tort cases, although I am confident that it is not uniformly the rule. However, that has little to do with the point we have urged. The addition to the treaty provisions of a clause stating that actions for passenger and baggage damages may be brought before a court "within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory" of that Contracting Party, represents a very substantial assurance that claims arising from the trip of an American citizen aboard a foreign airline between two foreign points, can be pursued in an American court. This can be done without having to worry about persuading that court to modify traditional conflicts of law rulings. Moreover, bringing Montreal Protocol No. 3 into force would mean that a judgment, once received in a United States court, would be meaningful when satisfaction is sought in a foreign jurisdiction.

Indeed, Mr. Kreindler himself underscores the very significant improvement in the treaty's jurisdiction provisions offered by Montreal Protocol No. 3, in stating that there have been numerous Convention cases where plaintiff lawyers have not been able to sucessfully serve a foreign airline in the United States. It was with this in mind that the United States Government pursued and achieved the additional jurisdictional option in the negotiations at Guatemala City.

Mr. Kreindler points out some instances in which he says claims have been settled speedily. Again, it is no doubt true that some claims are settled speedily, but others -- particularly those involving the high levels of damages on which Mr. Kreindler focuses -- require a long time. It is too soon to comment on the Tenerife disaster, but it is a good bet that disposition of most of the claims arising out of that accident will require a great deal longer time than the six months contemplated to be the rule under the Protocol. In both the Paris and Everglades accidents mentioned by Mr. Kreindler, some cases remain unsettled today, and even if Mr. Kreindler's statements are taken uncritically, the time required for settlement of a significant number of claims has in fact far exceeded six months in both cases.

It would seem to us self-evident that a no-fault regime embodying a settlement inducement clause leading to disposition of claims within six months will inevitably and dramatically speed up a process which now involves prolonged evidentiary reviews as plaintiff lawyers strain to prove "wilful misconduct" in order to break limits which some U.S. courts consider far too low by U.S. standards.

The quid pro quo for introducing the "unbreakability" feature to the treaty regime was multi-faceted: elimination of the need to prove fault in any case, even in such an extreme example as the downing of an aircraft by a heat-seeking missile launched by a terrorist; a five-fold increase in the basic treaty limit itself plus provision for a domestic supplemental compensation plan which has now added a further tier of $200,000 in provable damages, meaning in the aggregate a 16-fold increase; and the heavy inducement for settlement within six months' time. No one can rule out the possibility that some claimants may try to break the limit of the new Protocol. However, we believe the Protocol limits are unbreakable and have so described the proposed new regime in our testimony before the Committee and in other representations we have made on this subject to anyone concerned.

With regard to the matter of attorneys' fees in these cases, I am enclosing copies of standard forms used to register and report retainer arrangements in New York State courts, as required under the rules of the various Departments of that State's Appellate Divison. Blumberg Form 540 reflects an agreement providing for a one-third share to the attorney in the event of a recovery based on the net sum recovered after deducting taxable costs and disbursements, including expert medical testimony and investigative services. Hospital liens, insurance liens and medical care liens are to be deducted from the gross recovery before computing the attorney percentage. Blumberg Form 548 accommodates agreements on contingent retainers entailing a sliding scale and provides that the attorney will recover 50% of the first $1,000; 40% of the next $2,000; 35% on the next $22,000; and 25% on any amount over $25,000, subject to the same exclusions as described with regard to Form 540. Blumberg Form 549 (retainer statement--sliding scale) is used to report the retainer agreement to the court, as required by the rules of the First and Second Departments of the Appellate Division. Blumberg Form 538 (closing statement) is used to report to the Court's Administration Office the ultimate disposition of amounts recovered, including compensation to the attorneys.

New York's First and Second Judicial Departments take in Manhattan, Bronx, Staten Island and Brooklyn, and we understand that the other departments of New York State's Appellate Division similarly require that the attorney's share of the damages be reported to the court. Further, we understand that it is customary for plaintiff bar specialists in New York State to exact two-thirds of a forwarding attorney's contingent fee (usually the standard 33 1/3%) as the price for providing the technical expertise necessary for the preparation of such a case.

It was no doubt this standard practice which accounted for Mr. Kreindler's response to an inquiry about U.S. contingent fee practice in the course of the Air Law Group Symposium on Manufacturers' Liability for Aviation Accidents held in the United Kingdom on February 1, 1971, an exchange which we have extracted from the published record of the Symposium and attached for your information.

In concluding, I would observe that there is an obvious difference of opinion between the position of the claimants' bar and the position of those who support ratification of the Protocols. In this connection, it is useful to focus once more upon the testimony of Mr. Charles N. Brower, appearing on behalf of the American Bar Association at the Committee's July 26 Hearings. Mr. Brower said:

> Last February, the Association's House of Delegates voted by the resounding majority of 209 to 81 to reject a resolution which would have put the ABA on record as opposing the Guatemala Protocol. By an equally resounding vote, the Association then voted in favor of a resolution supporting advice and consent. I think it important at the outset to point out to the committee and the Senate that all of the arguments that you will have heard opposing the Guatemala

> Protocol were presented to the American Bar Association before it adopted its position. After thorough examination of all pertinent considerations, both pro and con, that body -- the nation's primary voluntary association of lawyers, representing all parts of the profession -- rejected those arguments.

The American Bar Association's exemplary in-depth, multi-committee review of this important matter stands in marked contrast to the deliberations of any other group of lawyers whose views have been presented to the Foreign Relations Committee.

Respectfully submitted,

James E. Landry

James E. Landry
Vice President &
General Counsel

cc: Lee S. Kreindler, Esq.

MANUFACTURERS' LIABILITY FOR AVIATION ACCIDENTS

This Air Law Group Symposium was held on 1st February 1971, and papers were presented by Mr. Brian Cookson on "The English Manufacturer's Point of View"; Mr. Lee S. Kreindler on "The American Legal Views"; Mr. David Dann on "The Insurers' Views" and Mr. Alan B. Hunter on "Aviation Products Liability—A Technical Viewpoint". The Chairman of the meeting was Mr. Justice Donaldson.

The English Manufacturer's Point of View

BRIAN COOKSON

Secretary, British Aircraft Corporation Limited

L. W. Collins (Lloyds of London): May I ask Mr. Kreindler what in his experience is the highest contingent basis on which an American plaintiff lawyer has acted?

Mr. Kreindler: I recall a case years ago, a products liability problem where it was so complex and so difficult and I might say involved so many lawyers who had to share in the contingent fee, that an overall fee of 50% was charged. It was a case where one lawyer had represented the family, he had gone to another negligence specialist who gave up but had done considerable work, then they came to me and I needed local counsel in the forum state. My conclusion was that success was unlikely but it was sufficiently interesting so we would devote the time in looking into it and in fact we agreed. And this is so long ago that I might say that it was before the Appellant Division Rule in New York which means at least 12 or 15 years ago. But we agreed in that case to take the case on a 50% basis and after doing about a year's work I gave it up because it was not possible. Outside of that case the highest contingent fee that I can recall from any one of my cases, and this of course is inclusive of all of the lawyers—you understand that practically every case that my office handles is referred to us by another attorney and the contingent fee is shared in one proportion or another by two or more sets of lawyers—but the highest total fee that I can recall from my cases is 33·3% and although you did not ask the question, I will answer it anyway. In that situation we typically get sixty per cent or two thirds of the fee or 20% out of the total of 33·3% and we do the bulk of the technical work of preparing the litigation. The forwarding attorney maintains the personal relationship with the client. In many cases the fee is less than 33·3%. I would say that the smallest that I have seen was 15%. I should add that a fee of more than 33·3% is forbidden in New York at this time without special permission of the court. In a special situation you can go to court and ask permission to charge a higher fee. The exception to that is the alternative of the so called sliding scale which starts at 50% of the first $1000, 40% of the next $2000, etc. At a total recovery of $33 000 it will in fact be a one third fee. Above that figure I think the maximum fee is 25% if the fee is arranged on a sliding scale basis. I would say that nationwide the standard fee in a negligence case, if there is a standard fee, is probably 33·3%. You very rarely see a fee higher than that.

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540 —Contingent Retainer—Straight 33⅓ Percent—
1st and 2nd Dept., App. Div.

Julius Blumberg, Inc., Law Blank Publishers
80 Exchange Place at Broadway, New York

To ____________________________________

____

Retainer

The Undersigned, residing at ____________________________________

hereby retains you to prosecute or adjust a claim for damages arising from—personal injuries sustained by ____________

____

loss of services of ____________________________________

property damage to ____________________________________

on the ________ *day of* ____________ *19* ____ *through the negligence of* ____________________

____

or other persons, and the undersigned hereby gives you the exclusive right to take all legal steps to enforce the said claim and hereby further agrees not to settle this action in any manner without your written consent.

In consideration of the services rendered and to be rendered by you, the undersigned hereby agrees to pay you and you are authorized to retain out of any moneys that may come into your hand by reason of the above claim:

Thirty three and one-third (33-1/3) percent. of the sum recovered, whether recovered by suit, settlement or otherwise.

Such percentage shall be computed on the net sum recovered after deducting taxable costs and disbursements, including expenses for expert medical testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action. But for the following or similar items there shall be no deduction in computing such percentages: Liens, assignments or claims in favor of hospitals, for medical care and treatment by doctors and nurses, or of self-insurers or insurance carriers.

Dated ____________________ *, 19* ____ ____________________ *(L.S.)*

Witness ____________________ ____________________ *(L.S.)*

Signatures

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548 —Contingent Retainer—Sliding Scale—
1st and 2nd Dept., App. Div.

JU' 'S BLUMBERG, INC., LAW BLANK PUBLISHERS
8 CHANGE PLACE AT BROADWAY, NEW YORK

To ______________________________

____

Retainer

The Undersigned, residing at ______________________________

hereby retains you to prosecute or adjust a claim for damages arising from—personal injuries sustained by ______________________________

____

loss of services of ______________________________

property damage to ______________________________

on the ______ *day of* ______________ *19* ____ *through the negligence of* ______________________________

____

or other persons, and the undersigned hereby gives you the exclusive right to take all legal steps to enforce the said claim and hereby further agrees not to settle this action in any manner without your written consent.

In consideration of the services rendered and to be rendered by you, the undersigned hereby agrees to pay you and you are authorized to retain out of any moneys that may come into your hand by reason of the above claim:

(A) Fifty per cent on the first one thousand dollars of the sum recovered;

(B) Forty per cent on the next two thousand dollars of the sum recovered;

(C) Thirty-five per cent on the next twenty-two thousand dollars of the sum recovered;

(D) Twenty-five per cent on any amount over twenty-five thousand dollars of the sum recovered; whether recovered by suit, settlement or otherwise.

Such percentages shall be computed on the net sum recovered after deducting taxable costs and disbursements, including expenses for expert medical testimony and investigative or other services properly chargeable to the enforcement of the claim or prosecution of the action. But for the following or similar items there shall be no deduction in computing such percentages: Liens, assignments or claims in favor of hospitals, for medical care and treatment by doctors and nurses, or of self-insurers or insurance carriers.

Provided, that in the event extraordinary services are required you may apply to the Court for greater compensation pursuant to the Special Rules of the Appellate Division regulating the conduct of Attorneys.

Dated ______________________, *19* ____ ______________________________ *(L.S.)*

Witness ______________________________ ______________________________ *(L.S.)*

Signatures

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B 549—Statement as to Retainer—Sliding Scale of Compensation,
App. Div., 1st and 2nd Depts., Ju 60.

Julius Blumberg, Inc., Law Blank Publishers
8 Exchange Pl. at Broadway, N. Y. C. 10004

For office use:

RETAINER STATEMENT

TO: OFFICE OF COURT ADMINISTRATION
OF THE STATE OF NEW YORK
Post Office Box 2016, New York, N. Y. 10008

1. Date of agreement as to Retainer.

....

2. Terms of Compensation.

(A) Fifty per cent. on the first one thousand dollars of the sum recovered;

(B) Forty per cent. on the next two thousand dollars of the sum recovered;

(C) Thirty-five per cent. on the next twenty-two thousand dollars of the sum recovered;

(D) Twenty-five per cent. on any amount over twenty-five thousand dollars of the sum recovered;

Provided, that in the event extraordinary services are required the attorney may apply to the Court for greater compensation.

3. Name and home address of client..

....

....

....

4. *If engaged by an attorney, name and office address of retaining attorney..

....

....

5. If claim for personal injuries, wrongful death or property damage, date and place of occurrence..

....

6. If a condemnation or change of grade proceeding:

(a) Title and description..

....

(b) Date proceeding was commenced..

(c) Number or other designation of the parcels affected

....

....

7. Name, address, occupation and relationship of person referring the client..

....

....

Dated:.., N. Y., ...day of..., 19........

Yours, etc.

....
Signature of Attorney

Print or Type

....
Attorney

....

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The Prudential Insurance Company of America
Prudential Plaza, Newark, New Jersey 07101

Alan N. Ferguson, FSA
Vice President and Actuary

August 3, 1978

Honorable James B. Pearson
and Honorable Richard Stone
United States Senate
New Senate Office Building
Washington, D.C. 20013

Montreal Protocol No. 3
Supplemental Compensation Plan

Gentlemen:

I have received a copy of a letter dated June 9, 1978 which you wrote to your colleagues in the Senate on the subject of the Montreal Protocols to the Warsaw Convention. You may recall that in the Foreign Relations Committee hearing on the Protocols which was held last year, I testified on behalf of the Prudential about the Supplemental Compensation Plan. The Prudential has agreed to administer the Supplemental Compensation Plan if it should go into effect. One of the questions raised in your letter concerns the level of the ticket surcharge for the Supplemental Compensation Plan. I would like to comment on this question.

In your letter you quote a statement from Mr. John Brennan, President of the United States Aviation Underwriters, in which he refers to the cost to U.S. airlines for aviation insurance. He states that in 1977 the cost of liability insurance to U.S. airlines was "about 40 cents per passenger per round trip". He contrasts this cost with the cost of the Supplemental Compensation Plan and implies that the proposed $2.00 initial Plan surcharge is excessive.

I believe that it is irrelevant to use the insurance cost for U.S. airlines engaged primarily in domestic flights as a standard for judging the cost of a Plan which applies only to journeys involving international flights including flights on foreign airlines. I also believe that, although the $2.00 initial surcharge was derived several years ago, it is still, based on the statistics available, an appropriate figure. The attached memorandum presents my arguments on these points in detail and includes a description of how the surcharge was derived.

In addition to the comments in the memorandum, I would like to point out that the Plan includes a formula for bringing the surcharge in line with the actual claims paid under the Plan so that if the surcharge has been set at too high a level, it will be reduced. It is also important to note that if the surcharge has been larger than is necessary to pay the claims, the result will be to increase the Supplemental Compensation Fund, thereby benefitting future passengers. This feature is unique in aviation insurance. Finally, as I stated in my testimony to the Foreign Relations Committee, if the expense charges that we have allowed for in the Plan prove to be excessive, we are prepared to make appropriate adjustments.

I apologize for the length of the description in my memorandum of the derivation of the surcharge but it is, I believe, important to demonstrate that the derivation is based on valid statistics from the past and reasonable assumptions about the future. A description of the derivation of the surcharge was given to the Civil Aeronautics Board in February 1977 and interested parties were thereby given the opportunity to comment. To my knowledge there has not been any comment which has shown the derivation to be incorrect or the assumptions invalid.

I am concerned that my presentation may make it appear that the Prudential has some selfish motive in advocating implementation of the Plan. I wish to assure you that this is not the case. Any profit which the Prudential might make from the Plan would be quite modest. The Prudential's participation in this Plan was in response to a request by the Federal government. We believe that we have performed a public service by assisting in the development of a viable Supplemental Compensation Plan. Other interested parties, including Mr. Brennan's company, had the opportunity to offer alternative plans. If better or less expensive alternative plans had been put forth, I assume that one of these plans would have been chosen by the government task force in preference to the Prudential's plan.

We do not believe it is appropriate for the Prudential to take a position on the Protocol itself--this is government policy and is outside the purview of our operations. However, we are firmly of the belief that the Plan as presently presented does offer a sound and economical basis for a system of compensation to those unfortunate enough to suffer a loss as a result of an airline accident.

If you should have any questions about the material included in the memorandum or any other questions about the Prudential's participation in the Plan, I will be pleased to try to answer them.

Sincerely,

Vice President & Actuary

ANF:sp

Attachment

cc: Senators Sparkman
Church
Case

Messrs. Landry, ATA
Brennan, USAU

bcc: Executive Office
Messrs. Braswell, Isherwood, Knapp, Margolin, Melone, Vogel

MEMORANDUM

August 1, 1978

Subject: Montreal Protocol No. 3
Supplemental Compensation Plan
Initial Surcharge Level

From: Alan N. Ferguson

This memorandum discusses the irrelevance of Mr. Brennan's figure of 40 cents for evaluating the cost of the Supplemental Compensation Plan. It also shows how the $2.00 initial surcharge level was derived and why it is still an appropriate figure to use.

1. Irrelevance of Mr. Brennan's 40 Cent Figure

Mr. Brennan's statement about the costs of aviation insurance is limited to those payable by U.S. carriers. It does not take into account the costs for foreign flag carriers which carry a substantial proportion of U.S. international passengers (see the table in Attachment A). Moreover, Mr. Brennan concedes that 90% of the flights upon which his costs were based were domestic. Thus, the 40 cent figure he used is not necessarily relevant for the risks involved where all journeys entail international transportation. The following statistics give ample support to the view that the risks involved in international transportation are higher than those in purely domestic transportation.

The table shows the number of enplanements and fatalities on U.S. scheduled airlines for the five year period 1973 through 1977 as reported in "Air Transport 1978", the annual report of the U.S. scheduled airline industry published by the Air Transport Association of America.

U.S. Scheduled Airlines
1973 - 1977

	Domestic	International
a) Fatalities	468	365*
b) Enplanements (millions)	990.3	88.1
c) Fatalaties per Million Enplanements (a ÷ b)	.473	4.143

---

* Since the data are only for scheduled service, they do not include the 321 fatalaties on the Pan American aircraft involved in the Tenerife disaster. It should be noted that the Tenerife accident would have been covered under the Supplemental Compensation Plan.

On a per enplanement basis the table shows a fatality rate for international flights that is over 8 times the rate for domestic flights (4.143 ÷ .473 = 8.76).

The foregoing statistics relate to U.S. scheduled airlines only. The Plan, however, also includes non-scheduled service and flights on foreign airlines; it is generally recognized that many foreign airlines do not match the safety record of U.S. scheduled airlines.

Thus, it is evident that the cost and risk factors involved in international air transportation are quite different from those in U.S. domestic air transportation and that a cost figure which may be appropriate for domestic aviation has no relevance to the proposed Plan surcharge.

2. Derivation of the Initial Supplemental Compensation Plan Surcharge

In determining the proper level of the initial surcharge, we did not use insurance costs of domestic or foreign airlines. We used basic statistics on the rates of fatalities and injuries and the amounts of claims which had been paid in recent years. Since the Plan is so radically different from standard insurance plans, the method we used seems the only rational way to proceed.

This section describes the steps and considerations involved in deriving the level of the initial surcharge.

One of the premises of the Plan, described in Section 4.3 of the Agreement, is that for the passengers covered by the Plan the long term average number of deaths and serious injuries is 1 claim per year for each 80,000 passengers. Attachment A to this memo indicates the basis for this assumption.

The statistics in Attachment A (which was also included with a December 31, 1975 filing with the CAB in support of the Supplemental Compensation Agreement) show the frequency of deaths and serious injuries for U.S. citizens on flights covered by the Warsaw Convention. As shown, the frequency for the period 1966 to mid-1973 was 1 claim in 79,000 passengers. Based on these statistics, we used an annual frequency of 1 claim in 80,000 passengers as a basis for figuring the initial surcharge. This is in fact a lower rate of claim than has been experienced more recently; updated through mid-1977, the long term frequency worsened to about 1 claim per 60,000 passengers, largely because of the Tenerife accident. However, it seems reasonable to assume that airline safety will improve over the long term and the figure of 1 claim per 80,000 passengers still seems appropriate.

In addition to the frequency of claims, the other major factor in setting the initial surcharge is the anticipated average claim amount. This is difficult to estimate because no information is available on what the amounts of settlements would have been for Warsaw cases had the limits of liability been higher. However, data on the unlimited liability settlements for non-Warsaw cases are available and it seems reasonable to use these data as guides.

As I explained in my statement attached to a February 20, 1976 submission to the Civil Aeronautics Board, such data have been developed by the CAB in studies which show the distribution of settlements by amount. The first such study covered settlements made during the period 1966 through 1970 for claims incurred in the period 1960 through 1696. 1/ The second study covered settlements made through mid-1974. 2/

The data in the CAB studies show the number of non-Warsaw settlements which exceed certain dollar levels--i.e., more than $1,000, $10,000, $50,000, $75,000, $100,000, $125,000 and so on. The threshold for claims against the proposed Supplemental Compensation Plan is currently about $124,000--based on the current level of Special Drawing Rights (SDR's). It is therefore reasonable to consider the claims in the CAB studies which are in excess of $125,000 (the nearest dollar amount in the study) as an indication of what experience may be expected under the Supplemental Compensation Plan.

The proportion of non-Warsaw claims which exceeded $125,000 for the years 1966 through 1969 was 26%. The proportion which exceeded $125,000 for the years 1970 through mid-1974 was 33% and for the last 18 months of this period was 39%. It seems reasonable to assume, because of inflation and the effect of easier settlements under the Supplemental Compensation Plan, that the proportion will continue to increase with time and for the first few years of the Plan's operation may be expected to be in the 60-70% range.

The amount of the average non-Warsaw claim in excess of $125,000 may also be determined from the CAB data. By limiting to $200,000 the amount by which such claims exceed $125,000, an estimate can be made of the average claim which would have been made if the Supplemental Compensation Plan had been in effect. For the years 1966 through 1969, the average settlement against the Plan would have been about $110,000. For the years 1970 through mid-1974 the average settlement would have been about $130,000 and for the last 18 months of this period would have been about $140,000.

Considering the trend of these figures and the inflationary and ease of settlement factors noted above, it seems reasonable to estimate that the average claim against the Plan during the first few years of its operation will be $160,000 to $180,000.

By combining the proportion of claims which may be expected to be made against the Plan with the average amount of such claims, the range of average claim to be expected in the first few years of the Plan can be derived. The range is $96,000 (60% of $160,000) to $126,000 (70% of $180,000). This is the average claim related to the total number of claims--i.e., to the estimated frequency of 1 claim in 80,000 passengers.

1/ Civil Aeronautics Board, Levels of Recoveries on Account of Passenger Deaths and Serious Injuries in Airplane Accidents (Covering settlements with respect to aircraft accidents occurring in the calendar years 1960 through 1969).

2/ Levels of Recoveries on Account of Passenger Deaths and Serious Injuries in Airplane Accidents, 1974 Study (Dated January 1, 1975).

The amount of the surcharge may then be calculated as follows:

$$\text{Surcharge} = (\text{Average Claim} \times \text{Claim Frequency}) \div .93$$

The .93 factor is the proportion of the surcharge which remains after the approximate 7% deduction for taxes, administrative expenses and risk-bearing charges. I stated in my testimony before the Senate Foreign Relations Committee that, based upon Prudential's experience with aviation reinsurance, the 7% level of "retention" compares very favorably with industry practice. I am not aware of any aviation insurance program that has as low a cost factor.

The result of applying this formula is that for an average claim of \$96,000, the surcharge is \$1.29 and for an average claim of \$126,000, the surcharge is \$1.69. Based on these figures it appears that the initial surcharge could be set at about \$1.50. The surcharge selected was, however, \$2.00. There are a number of reasons why the higher figure was selected.

One reason relates to the building up of a Plan Fund balance. A premise of the Plan described in Section 4.3 of the Agreement is that the net balance of the "Supplemental Compensation Fund" (described in Section 2.3 of the Agreement) should over the long term be approximately \$5.00 times the annual number of Plan surcharges collected. The purpose of maintaining such a balance is to enable the Fund to absorb the effects of an airline disaster and so avoid the need for drastic increases in the surcharge. It requires that the surcharge be greater than the amounts required merely to pay claims as calculated above; an additional amount must be charged in order to build up the Fund balance. Incidentally, any balance in the Fund earns interest thereby increasing the Fund and benefitting future passengers.

Another reason for selecting the initial \$2.00 level of the surcharge is to allow for the payment of Supplemental Medical Benefits for which provision is made in Paragraph 3.5 of the Agreement. These benefits are in addition to the basic benefits paid by the Plan.

Allowance must also be made for the fact that domiciliaries and permanent residents of the United States are covered under the Plan on all transportation subject to the Protocol whether their ticket is subject to the surcharge or not. (Only tickets purchased in the U.S. will include the surcharge.)

Thus, considering all the factors involved, an initial surcharge of \$2.00 is reasonable. It must, however, be conceded that no one can be certain as to future accident occurrences. For this reason, Section 4.2 of the Agreement includes an automatic adjustment formula to make certain that once the Plan is in operation, the level of the surcharge will reflect actual experience. Whatever claims are paid by the Plan will affect the level of the future surcharge. Thus, if the claim costs are less than those assumed, the surcharge will be reduced in accordance with the formula.

Vice President and Actuary

ANF:sp

Attachment A

U.S. Citizen Departures

	U.S. Passengers* to & from Canada (1)	1/2 of Column (1) (2)	Citizen Departures** by U.S. Carriers (3)	Citizen Departures** by Foreign Carriers (4)	Total Ticket (2)+(3)+(4) (5)
1966	1,100,000	550,000	1,911,663	1,345,898	3,807,561
1967	1,170,000	585,000	2,335,613	1,484,160	4,404,773
1968	1,310,000	655,000	2,747,694	1,555,720	4,958,414
1969	1,530,000	765,000	3,157,585	1,940,063	5,862,648
1970	1,590,000	795,000	3,557,405	2,261,094	6,613,499
1971	1,640,000	820,000	3,971,972	2,357,157	7,149,129
1972	1,750,000	875,000	4,624,140	2,953,202	8,452,342
Total 1966-72					41,248,366
1973	1,990,000	995,000	5,267,000	3,476,000	9,738,000
7/12 of 1973					5,680,500
Total 1966-July 1973					46,928,866

Years 1968-1972 furnished by CAB as derived from Canadian Air Transport Board figures for total U.S./Canada traffic. Other years estimated on the basis of simple linear progression (and regression).

Taken from Immigration and Naturalization Service records, 1968 to 1972.

Deaths and Injuries

Outside U.S. - Data derived from annual accident report of the U.K. Air Registration Board and reports of deaths to U.S. citizens from Department of State, U.S. Consular report.	490
Pan Am Crash in Tahiti - July 1973	33
Estimated Guatemala Deaths Inside U.S.	12
Total	535
Injuries Estimated to be 11% of Fatalities	59
Total	594

Involvement Rate: 46,928,866 ÷ 594 = 1 per 79,005 tickets

JUN 26 1978

Dear Mr. Chairman:

The Departments of State and Transportation have received a number of inquiries in the past few months from foreign governments about the status of Senate action on Montreal Protocols 3 and 4 of 1975. These provisions incorporate the Guatemala City Protocol to the Warsaw Convention and establish uniform international rules for passenger recoveries against air carriers.

The two Departments have testified in hearings before your Committee that Protocols 3 and 4 in large part reflect international agreement to proposals by the United States for much-needed revision of the Warsaw Convention. If the new provisions are ratified by the United States, we believe other states will adopt them quickly.

We urge the Committee to take prompt action on the Protocols and report them favorably to the Senate.

We will be happy to provide any further information the Committee would find useful.

Sincerely,

Warren Christopher

Warren Christopher
Deputy Secretary of State

Alan Butchman

Alan A. Butchman
Deputy Secretary of
Transportation

The Honorable
John J. Sparkman, Chairman,
Senate Foreign Relations Committee,
United States Senate.

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

- -

Agreement Among Certain Air Carriers Serving the United States and The Prudential Insurance Company of America Establishing Supplemental Compensation Plan Pursuant to the Amended Warsaw Convention

- -

Docket 28713
Agreement CAB
Former Docket 28226

OPPOSITION TO THE APPLICATION

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON AERONAUTICS

RE: THE PROPOSED GUATEMALA PROTOCOL TREATY AND SUPPLEMENTAL COMPENSATION PLAN

The Air Transport Association of America has submitted a petition to the Civil Aeronautics Board for approval of a Supplemental Compensation Plan which would take effect with the Guatemala Protocol Treaty. At the present time the President is considering whether to submit the proposed treaty to the United States Senate for its advice and consent.

We recommend that the Civil Aeronautics Board disapprove the application, the President decline to submit the treaty proposal to the United States Senate and, if submitted, the Senate decline to give its advice and consent.

History. In 1934, the United States approved the Warsaw Convention Treaty which limited the liability of airlines in international accidents for damages for death and injuries to certain passengers. The international airline industry was then in its infancy and largely uninsurable for such accident losses. The treaty limited damages to $8,300 per passenger unless the airline proved that the accident was not caused by its negligence, in which event there would be no recovery. A passenger could recover his actual damages by proving the airline was guilty of wilful misconduct.

As the *international* airline industry matured, full economic protection against accident losses was obtained by liability insurance or self-insurance. As a consequence, there was manifested general dissatisfaction with both the desirability of a damage limit which deprived the victims of a large part of their damages and with the inadequacy of the damage limit. In 1965, the Hague Protocol was proposed to amend the Warsaw Treaty and double the damage limit, but it was still so inadequate that the United States denounced the Warsaw Treaty effective six months later in 1966. Prior to the effective date of the denunciation, airlines engaged in international transportation agreed to increase the damage limitation to $75,000 a passenger by signing a contract known as the Montreal Agreement. This increased damage limitation applied only to passengers with international tickets scheduling the United States in the itinerary. The practical effect was to benefit American passengers, or those travelling from, to or through the United States, but not passengers whose ticketed travel is limited to other countries. The Montreal Agreement also provided for waiver by the airlines of the defense of due care which was available under Warsaw to fully escape payment of any damages. The defense of a passenger's contributory negligence was continued.

By signing the Montreal Agreement and promising to consider it an interim measure, the airlines persuaded the United States to withdraw its denunciation of Warsaw prior to the effective date. Thus, the Warsaw Treaty has continued in effect. The change in the price of gold has prompted the CAB to declare the Warsaw limit to be $10,000.

During the past decade and at the present time, there are remarkably different systems governing the rights and liabilities of certain international passengers and airlines involved in aviation accidents. They may be categorized as a general rule with three exceptions. Generally, airline passengers who are injured and the estates and families of those who are killed can recover the actual damages caused by an airline's negligence or the negligence of any other party, such as a manufacturer or the United States for actions of its air traffic controllers. The exceptions to this general principle involve three different limitations of damages recoverable from an airline where the passenger's ticket itinerary lists at least two countries. The three different damage limitations are $10,000, $20,000 and $75,000. The last applies to passengers with tickets listing an international itinerary that includes a place in the United States, provided the accident occurs during carriage by an airline which is a party to the Montreal Agreement. In all other international circumstances, either of the two lower damage limitations applies, depending upon whether the particular countries listed on the ticket itinerary have approved the Warsaw or Hague Treaties.

The applicable damage limit in the international exceptions favors airlines and their employees only, and not any other negligent party, such as a manufacturer or a government. Moreover, the international exceptions apply even if the passenger is injured or killed during a wholly domestic portion of an international ticket itinerary. Proof of an airlines' wilful misconduct would result in the recovery of the actual damages sustained above the applicable damage limitation. There are other ways to escape the damage limitation.

The Guatemala Protocol Treaty. This treaty proposal would amend the Warsaw Treaty, and in those countries where the Hague Treaty has been approved, it would be amended as well. Moreover, the Montreal Agreement would be eliminated by adoption of the Guatemala proposal. The new treaty would increase the damages recoverable from an airline to $120,000; however, recovery above that limit is prohibited, even if the airline was guilty of wilful misconduct. The Guatemala Proposal is openly directed to limiting recoveries by Americans. If every country in the entire world, except the United States, approved this treaty, it would not become effective. Approval by the United States would place the Guatemala Treaty in effect.

During the time the Guatemala Proposal was being formulated, the United States recognized that the new damage limitation was inadequate and would under compensate a very substantial number of American passengers injured or the families of those killed in international aviation accidents. Consequently, the United States pressed for and sufficient countries authorized incorporation of a provision in the Guatemala Treaty to permit a country to adopt a plan for compensation supplemental to the Guatemala limit. The ATA's application to the CAB presents such a supplemental plan.

The Supplemental Compensation Plan. Under this plan, every passenger purchasing a ticket in the United States with an international itinerary will be required to pay an assessment of $2.00. This additional fee will be collected by the air carrier and transmitted to the Prudential Insurance Company. The resulting fund will probably accumulate at a rate substantially more than ten million dollars a year, will provide Prudential with a guaranteed profit and payment of overhead, and will enable recovery of actual provable damages in excess of the Guatemala limit up to an additional maximum of $200,000 per passenger. This coverage is not life insurance, but a passenger funded airline accident insurance system with a damage limitation, which, together with the Guatemala limit would total $320,000 per passenger.

In the event a full recovery of the Guatemala limitation was obtained, then and only then would the Supplemental fund be available for additional recovery. In the event the Prudential declined to offer an acceptable sum within its $200,000 limitation and a judgment were obtained in excess thereof, the fund would only be liable to the extent of the limit.

The Aeronautics Committee is reliably informed that the cost to airlines of full liability insurance for actual passenger damages, without limitation, would be substantially less than the $2.00 per passenger assessment for a limited damage system under the supplemental plan alone.

Basis for opposition. Both the Guatemala Protocol Treaty and the Supplemental Compensation Plan proposals should be opposed for several reasons. First, there is no justification in our system of tort law for limiting the damages recoverable by injured passengers or the estates and families of deceased passengers. Second, according to current statistics provided by the CAB the proposed total damage limits of the treaty and the supplemental plan could deprive a very substantial number of American victims of recovery of their actual damages. As a practical matter, it would seem that the Prudential fund would rarely if ever voluntarily settle for the $200,000 limit because that is its absolutely maximum exposure. Thus, lesser settlements or numerous damage trials will result. Third, foreign international airlines primarily and to a lesser extent domestic airlines would be the beneficiaries of the proposals at the expense of all American passengers traveling abroad who were the victims of airline crashes. Fourth, airlines do not require the protection afforded by these proposals because they can obtain liability insurance for full actual damages without any arbitrary limitation at a cost substantially below $2.00 per passenger. Fifth, since the damage limitation proposals favor airlines only, suits against non-airline entities would be encouraged in attempts to recover actual damages, even though such negligence was relatively minor by comparison to the fault of the airline.

Available Alternatives. Two alternatives to the Guatemala-Supplemental system are available. First, the present Montreal Agreement-Warsaw system which provides for a $75,000 limitation of airline liability in international transportation and recovery of full damages for extreme airline fault can be amended. A simple contractual amendment to the Montreal Agreement could increase the limitation to $320,000 or any other sum. Such an amendment would be much more desirable and flexible than the Guatemala-Supplemental Plan proposals, and the passenger could still recover full damages from the airline upon proof of wilful misconduct. Second, the Warsaw Treaty can be denounced simply by the Secretary of State issuing a letter to that effect. The result of such denunciation would place American passengers with international ticket itineraries in the same position as American passengers with domestic ticket itineraries.

A copy of this Opposition to the Application has been served by ordinary mail, postage prepaid, upon the Applicant, the Air Transport Association of America, at 1709 New York Avenue, N.W., Washington, D. C. 20006 and on the following who I understand are the only other parties thus far to the proceeding: Aerospace Industries Association of America, 1725 DeSales Street, Washington, D. C. 20036; Association of Trial Lawyers of America, 1620 I Street, N. W., Washington, D.C. 20006; U. S. Department of Transportation, William Driscoll, TGC10, 400 Seventh Street, S.W., Washington, D.C. 20590; and and U.S. Department of Justice, David Brown, Esq., Anti-Trust Division, P.O. Box 7513, Washington, D.C. 20044.

Dated: New York, New York
January 16, 1976

Respectfully submitted,

The Association of the Bar
of the City of New York
42 West 44th Street
New York, New York 10036
Cyrus R. Vance, President
Paul B. DeWitt, Executive Secretary
Benjamin E. Haller, Chairman,
Committee on Aeronautics

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D.C.

---------------------------------------x

Agreement Among Certain Air Carriers Serving the United States and Prudential Insurance Company of America Establishing Supplemental Compensation Plan Pursuant to the Guatemala Protocol Amending the Warsaw Convention as Amended by The Hague Protocol	Docket No. 28713 (formerly 28226) Agreement CAP

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STATEMENT IN OPPOSITION TO THE PROPOSED SUPPLEMENTAL COMPENSATION PLAN PURSUANT TO THE GUATEMALA PROTOCOL

INTRODUCTION

The Association of Trial Lawyers of America (ATLA) pursuant to 14 C.F.R. §1608 hereby files its Statement in Opposition to the "Application for Prior Board Approval of Agreements" filed on December 31, 1975 by Paul R. Ignatius, President of the Air Transport Association of America (ATA) as Attorney-in-Fact for various air carriers. The ATA application seeks approval of a proposed Supplemental Compensation Plan (SCP) entered into by the air carriers and the Prudential Insurance Company of America ("Prudential") pursuant to Article 35A of the proposed Guatemala Protocol.

The proposed SCP would provide a form of mandatory accident insurance providing benefits up to $200,000 for death or personal injury to passengers in international air transportation plus supplemental medical benefits in injury cases where the $200,000 has been exhausted. These benefits would be funded by the imposition of a mandatory surcharge on all tickets purchased in the United States for international transportation. The surcharge would initially be $2, but later, depending on experience, might be larger.* A fund, created from the surcharges, would be managed and the benefits administered by the Prudential Insurance Company.

The benefits to a passenger or his heirs under the SCP are available over his recoverable compensation under the proposed Guatemala Protocol. Under Gautemala, as modified by Montreal Protocol #3, the liability of an airline is absolutely limited to 100,000 Special Drawing Rights (SDR's) or approximately $117,000 at current exchange rates.

Thus the proposed Guatemala-SCP system may fairly be characterized as airline limited liability plus insurance mandatorily imposed on the passenger.

Despite its name, the "Supplemental Compensation Plan" is not a compensation plan at all. It is an insurance program under which a passenger can realize benefits derived from a premium which he has been forced to pay. If the airline paid the premium, or otherwise funded the plan, it would be a "compensation" plan, but as now constituted, it is not.[1]

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*Although the premium may be larger, and, indeed exceed $4, for convenience we shall refer to it as a "$2 surcharge".

Furthermore, under the Plan the airline or the contractor or the fund does not give anything to the passenger or provide anything for him. They simply require him to buy an insurance plan.

The State Department and other responsible Government agencies have conditioned submission of the Guatemala Protocol to the Senate for its advice and consent upon establishment of a satisfactory supplemental plan. Thus the SCP must be considered not only in isolation from the Guatemala Protocol, but as an essential part of a system of absolute but limited airline liability.

We oppose approval of the SCP by the Civil Aeronautics Board for the following reasons:

First The C.A.B. lacks statutory authority to approve the application.

Second - The Board lacks jurisdiction over an insurance program to be administered by an insurance company.

Third - The proposed SCP would violate the Federal

---

[1] That the system is an insurance plan and not a compensation plan is confirmed by the attitude of the State of New Jersey Department of insurance which approved it. In a letter to Kreindler & Kreindler dated December 16, 1975, the Chief Actuary of the Department said:

> "The statutory authority for our approval of Prudential's Supplemental Compensation Plan under the "Guatemala Protocol" is to be found in the provisions with regard to 'blanket' group health insurance contained in N.J.S.A. 17B:27-32."

Aviation Act in that it would unlawfully deny passengers their right of transit and transportation and therefore must be disapproved.

Fourth - The proposed SCP violates the anti-trust laws of the United States.

Fifth - The proposed SCP is contrary to the public interest in that it is an essential part of a package that would deny a significant percentage of airline passenger accident victims or their heirs reasonable damages for personal injury or death.

Sixth - The proposed SCP is contrary to the public interest in that it is an essential part of a package which would eliminate examination into the cause of and responsibility for air crashes.

Seventh - The proposed SCP is unconstitutional in that it is an essential part of a scheme that discriminates among those responsible for air crashes, does not provide due process or equal protection of the laws and impinges upon the freedom to travel.

Eighth - Insufficient economic data has been submitted in support of the SCP to justify the radical changes which would follow approval. In particular there is no showing that the proposed system of limited liability-mandatory insurance would cost the passengers less than the general tort system, applicable domestically, of unlimited liability and full damages.

THE INTEREST OF ATLA

THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA CONSISTS OF 25,000 LAWYERS WHO SPECIALIZE IN THE REPRESENTATION OF ACCIDENT VICTIMS, INCLUDING VICTIMS OF AIR CRASHES. AS SUCH OUR MEMBERS ARE IN CLOSE TOUCH WITH THE PROBLEMS PRESENTED TO AIRLINE PASSENGERS WHO ARE SUBJECT TO LIMITATIONS OF AIRLINE LIABILITY.

POINT I

THE C.A.B. LACKS STATUTORY AUTHORITY TO APPROVE THE SCP.

The Federal Aviation Act of 1958, 49 U.S.C.§1301 et seq., ("the Act") contains no provision which authorizes the Civil Aeronautics Board to approve a private agreement which would give air carriers the power to impose a mandatory $2 charge on all international air travellers purchasing tickets in the U.S. for international transportation to fund limited insurance benefits for death or personal injury. Such an agreement, to be effective, requires an Act of Congress. Airlines do not have the power to require passengers to purchase insurance as a condition to their travel. Nor does the Civil Aeronautics Board, absent an Act of Congress. An agreement may not be approved under §412 of the Act unless such an agreement has a statutory foundation.

The scope of the Act and the purposes to be served by the C.A.B. are clearly defined.

> "the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:
>
> (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;
>
> (c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;
>
> (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;
>
> (e) The promotion of safety in air commerce; and
>
> (f) The promotion, encouragement, and development of civil aeronautics.
>
> Federal Aviation Act, §102 [49 U.S.C. §1302]

Where the purpose of the Federal Aviation Act and scope of authority of the C.A.B. have been placed in issue courts have opined that the Act

> "was passed by Congress for the purpose of centralizing in a single authority, indeed in one administrator, the power to frame rules for the safe and efficient use of the nation's airspace."
>
> Airline Pilots Ass'n v. Quesada, 276 F.2d 892, 894 (2nd Cir. 1960);

and

> "was enacted and regulations promulgated thereunder, to promote civil aviation while assuring maximum safety in the air." Arney v. United States, 479 F.2d 653, 658 (9th Cir. 1973) citing Rosenhahn v. United States, 131 F.2d 932, 934, (10th Cir. 1942) Cert. denied, 318 U.S. 790, 63 S.Ct. 993, 87 L. ed. 1156; 1958 U.S. Code Cong. & Adm. News, p.3741
>
> "The purpose of the Act is not primarily to advance the private interests of carriers, but the public interest in an adequate air transport system." United Air Lines v. C.A.B., 198 F.2d 100 (7th Cir. 1952)

It is axiomatic that the authority of every administrative agency is delineated and circumscribed by the terms of its statutory grant. Elgin Joliet and Eastern Ry Co. v. Buy Harris & Co., 245 F.Supp. 467 (D.C. Ill. 1965)

Consistent with Congressional concern for the "safe and efficient" use of American airspace, the C.A.B. was granted authority to approve "rates, fares and charges for air transportation" between points served by air carriers [49 U.S.C.§1373, §1382] and to regulate the use of air space over the United States through the issuance of "certificates of public convenience and necessity." [49 U.S.C.§1371]

To fulfill these regulatory responsibilities §412 of the Federal Aviation Act [49 U.S.C. §1382(b)] required that air carriers which might enter into agreements among themselves in matters relating to "rates, fares and charges" or which eliminate or affect competition through allocation of routes and schedules obtain prior approval of such agreements from the C.A.B. Such approval, even if the agreements had anti-competitive consequences would relieve the carriers of the sanctions of the anti-trust laws. [49 U.S.C.§1384]

Section 412 of the Act, essentially a procedural technique for review and control of private agreements, does not contemplate nor confer upon the C.A.B. any power or authority to approve agreements beyond the scope of the Act. To hold otherwise would be to allow private agreements to enlarge the scope of the Act and enable the Board to assume powers not granted it by Congress.

Section 412(a) of the Act provides:

> "Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving

> and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements."

A mandatory insurance program is hardly a "rate, fare, charge, or classification" under §412.

Any reliance placed upon approval under §412 of the Montreal Agreement by the C.A.B. as precedent for approval of the SCP would be misplaced. The Montreal Agreement constituted only a waiver by international airlines of various limits and defenses available to them under the Warsaw Convention. It called for no required payment by passengers.

It is the element of compulsion in the SCP in its method of funding which deprives the C.A.B. of its authority to act in this situation. Were the SCP merely a "waiver" of the Warsaw Convention damage limitations, and if it only involved air carriers it could be approved under §412.

The imposition of a mandatory insurance charge may be compared with the imposition, by tariff, of a limitation of liability. In Bernard v. U.S. Air Coach, 117 F.Supp.134, 138 (S.D. Cal. 1953), a domestic air carrier sought approval of a "tariff" by which it sought to limit its tort liability. The court in finding that a limitation of liability may not be realized in the absence of a statute or treaty observed

> "The only definition attempted in Title 49, U.S.C.A., which sets forth the Statute in detail, is that every air carrier shall file" * * *tariffs showing all rates, fares, and charges for air transportation between points served by it, and between points served by any other air carrier or foreign air carrier when through service and through rates shall have been established, and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices and services in connection with such air transportation. * * *" 49 U.S.C. §483. The tariff thus referred to is clearly a tariff for service to be rendered by the airplane and not one for compensation for the torts committed by it. Compensation for torts is, with rare statutory exemptions (such as those enumerated under Workmen's Compensation Acts), measured by individualized application of general rules of damages in tort liability. The Act here involved does not, nor does any other statute, permit an air carrier or paying passengers to limit its tort liability. It is true that in international air transportation there is a limitation of liability under what is generally known as the Warsaw Convention Treaty. 49 Stats. at Large 3000 treated in Limitation of Air Carriers' Liability, 13 A.L.R. 2d 337. This Treaty is not involved here. It is a basic principle of law that one cannot in advance of doing an act of negligence, limit his or its liability for the results which flow from the tort of negligence, New York Central Ry. v. Lockwood, 17 Wall. 357, 84 U.S. 357, 21 L.ed. 627."

The SCP is neither a statute nor treaty; it is a private agreement. Approval under §412 of the Act does not change its character.

The proposed Guatemala Protocol itself, even assuming it was ratified, does not authorize a non-statutory scheme of supplemental benefits, and particularly one which would impose a non-voluntary charge on passengers. It merely amends the Warsaw Convention to permit a country, pursuant to its laws, to establish a supplemental plan. Article 35A provides:

> "No provision contained in this Convention shall prevent a State from establishing within its territory a system to supplement the compensation payable to claimants..." (Emphasis supplied)

Absent the Guatemala Protocol itself there is no treaty that authorizes a supplemental compensation plan or the imposition of a mandatory charge for insurance on passengers.

In short, since Congress has not enacted any law or otherwise acted in a manner which allows air carriers to compel air passengers to buy limited insurance coverage and thereby relieve the carriers of the major burden of their tort liability, the C.A.B. lacks the authority to approve the SCP.

POINT II

THE BOARD LACKS JURISDICTION OVER AN INSURANCE PROGRAM TO BE ADMINISTERED BY AN INSURANCE COMPANY.

In Foremost International Tours, Inc. v. Qantas Airways Limited, et al., 525 F.2d 281 (9th Cir. 1975) the Court of Appeals held that the CAB had no jurisdiction over the tour industry or tour operators, rejected Qantas' contention that the CAB had primary jurisdiction and affirmed the granting of an injunction against Qantas on antitrust grounds.

The Court said:

> "Agencies, because their interests are narrowed and fixed on one industry, may be better able to balance the competing interests within the industry and the welfare of the consumers of the industry's service or product. In light of these factors, the District Court is to refrain from immediate or hasty interference in intra-industry problems of industries subject to the control of a regulatory agency, until the regulatory agency has had an opportunity to carry out the functions for which it was initially created by Congress. The policy more simply stated is that when a matter is wholly an intra-industry problem the agency created to regulate that industry should initially determine that problem.
>
> Where, however, the antitrust problem facing the court is not wholly confined to the regulated industry, other factors and policy considerations may substantially alter the desirability of according such substantial deference to any agency which does not have a perspective broader than its own industry, or the interest, expertise, power, or willingness to deal with an inter-industry problem."

The Court continued:

> "Here we have Quantas, a firm engaged in a regulated industry, entering the tour industry, which is not per se regulated by the CAB, and its entry into this industry is alleged to have had an anticompetitive effect on the non-CAB-regulated tour industry. In this case, while the CAB has authority over Quantas, and arguably has the means to enforce an order against Quantas should it so choose, in lacking authority over all the parties, it cannot make the accomodations and effect the compromises which are the hallmark of agency regulation. It may well lack the means to deal with the total problem. But more importantly, the regulatory agency here also lacks the expertise and the incentive (-- after all it is not its industry --) to act on an inter-industry problem."

And the Court added:

> "For instance, we do not think it would be seriously contended that the CAB could by its approval of a merger between an airline and a hotel chain, or by the memorialization of a resolution allowing airlines to go into the hotel business, legally permit an airline to monopolize the hotel business with impunity; nor if several airlines went into the hotel business, approve their dividing up of territories, or fixing prices in the hotel business."

The Foremost case is analogous to the application here. The Agreement for which the ATA seeks approval is an agreement between airlines and Prudential, an insurance company, which would give Prudential a monopoly on the sale of accident insurance up to $200,000 in excess of the Guatemala limit, and would require all passengers to purchase such insurance, as a condition to travel.

The CAB has no jurisdiction over Prudential, or over the insurance industry generally, and approval of this agreement would be beyond its power.

Furthermore, granting approval would not immunize the airlines or Prudential from the antitrust laws. As stated by the Court in Foremost:

> "The scope of the antitrust immunity which an agency's approval can confer under statutes such as 49 U.S.C. § 1384 was intended to be, and is, no broader than the industry regulated. Butler Aviation Co. v. CAB 389 F.2d 517, 521 (2d Cir. 1968). A regulatory agency's approval of certain actions cannot confer antitrust immunity to those actions unless the primary anti-competitive effect those actions may have is limited to the industry in question."

Under § 412 (a) and (b) of the Act [49 U.S.C. § 1382] an air carrier must file an agreement between it and any other air carrier, and the Board shall approve any such agreement not adverse to the public interest or in violation of the Act.

The proposed Agreement establishing the SCP is not an agreement between air carriers and, consequently does not come within § 412. It is an agreement between air carriers and an insurance company providing for the establishment, without legal authority, of compulsory insurance. Breen Air Freight, Ltd. v. Air Cargo, Inc., 470 F.2d 767 (2d Cir. 1972) cert. denied 411 U.S. 932, 36 L.Ed.2d 392, 93 S.Ct. 1901.

In Breen the Court said:

> "Under the Federal Aviation Act of 1958 (72 Stat. 731) the CAB is given broad authority to regulate certain aspects of the airline industry throughout the United States. See Pan American World Airways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963). Pursuant to this authority the CAB is empowered to approve agreements among air carriers and air carriers and common carriers affecting air transportation.

* * *

> [1] This Court cannot agree that the agreements have been immunized, that they are 'arguably lawful,' or that the CAB has jurisdiction, primary or otherwise, to immunize them. We rest on the ground that the agreements, viewed as independent parts of a single inclusive plan, have not been executed by 'air carriers' and that consequently the Board lacks authority to immunize the contracting parties from liability for antitrust damages."

Where one of two parties to an agreement was not an air carrier the Board has held that § 412 was inapplicable. American Airlines, Inc. Acquisition of Control of Mid-Continent Airlines, Inc. (1946) 7 C.A.B. 365.

POINT III

THE PROPOSED SCP WOULD VIOLATE THE FEDERAL AVIATION ACT IN THAT IT WOULD UNLAWFULLY DENY PASSENGERS THEIR RIGHT OF TRANSIT AND TRANSPORTATION, AND THEREFORE IT MUST BE DISAPPROVED.

§ 412 b of the Act provides:

> "The Board shall by order disapprove any such contract or agreement...that it finds to be...in violation of this Act."

§ 104 of the Act [49 U.S.C. 1304] provides:

> "There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

§ 404 a of the Act [49 U.S.C. 1374] provides:

> "It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor...."

There are certain well-defined exceptions to the absolute right to transit and transportation. These are spelled out and authorized by statute. For example, § 1111 of the Act provides:

> "(a) The Administrator shall, by regulation, require any air carrier, intrastate air carrier, or foreign air carrier to refuse to transport---
>
> (1) any person who does not consent to a search of his person, as prescribed in section 315(a) of this Act, to determine whether he is unlawfully carrying a dangerous weapon, explosive, or other destructive substance, or
>
> (2) any property of any person who does not consent to a search or inspection of such property to determine whether it

> unlawfully contains a dangerous weapon, explosive, or other destructive substance.
>
> Subject to reasonable rules and regulations prescribed by the Administrator, any such carrier may also refuse transportation of a passenger of property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.
>
> (b) Any agreement for the carriage or persons or property in air transportation or intrastate air transportation by an air carrier, intrastate air carrier, or foreign air carrier for compensation or hire shall be deemed to include an agreement that such carriage shall be refused when consent to search such persons or inspect such property for the purposes enumerated in subsection (a) of this section is not given."

The Board has recognized that the passenger's right to demand air transportation is qualified by the duty of the carrier to observe proper standards of safety. Jack Adler v. Chicago & Southern Air Lines, Inc., (1943) 4 C.A.B. 113, 117.

The proposed SCP would clearly violate Sections 104 and 404 of the Act since it would deny transit and transportation to any passenger who declined to pay the mandatory $2.00 surcharge.

§ 4.1 of the proposed Agreement provides:

> "The Carriers agree that a Plan Surcharge shall be collected with respect to every person for whom international air transportation originating within the territory of the United States is to be performed...."

There is no statutory authorization for such denial of transportation. Accordingly, since it would violate the Act under § 412 b the Agreement must be disapproved.

POINT IV

THE PROPOSED SCP VIOLATES THE ANTI-TRUST LAWS.

The Sherman Anti-trust Act of July 2, 1890 provides

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C.§1

The purpose of the anti-trust laws is to preserve a system of free competition and to protect the public from monopolies and restraints of trade. Fortner Enterprises Inc. v. U.S. Steel Corp. 394 U.S. 495, 89 S. Ct. 1259, 22 L.ed. 2d 495 (1969) 15 U.S.C. §1-7

The proposed SCP on its face is repugnant to the anti-trust laws. It is a non-competitive "contract" between the airlines and Prudential which requires airplane passengers to pay a premium arbitrarily fixed to purchase insurance coverage in excess of the Guatemala Protocol limit as a condition of international travel. Because of its anti-trust overtones the SCP must be disapproved if it does not fall within a recognized exemption and serve the "public interest".

Two possible bases for exemption of the SCP from the anti-trust laws may be considered though analysis will demonstrate that neither of them will be available in this instance.

The SCP may be exempt under §414 of the Act [49 U.S.C. §1384]. The section provides:

> "Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws', as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

Section 1378 relates to "consolidation, merger, and acquisition of control" of airlines and Section 1379 relates to "prohibited interests; interlocking relationships; profit from transfer of securities." Neither of those aspects of air carrier activity are involved here. Section 1382 [§412 of the Act] can similarly not serve as the basis of relief from the antitrust laws for the reasons we have discussed in Point I. A private agreement cannot be approved if the agreement has no statutory foundation.

If the SCP were the kind of insurance plan which might be implemented on the basis of State approval an exemption might be claimed under the McCarran-Ferguson Act (15 U.S.C. §1011, 1012) which reserved to the states regulation of insurance. We doubt that anyone would seriously suggest that the insurance department of a State or even a State legislature has the authority to authorize the SCP and compel payment of the $2 surcharge by all international travellers buying tickets in the United States. The proposed Guatemala Protocol grants permission to "supplement" its benefits only to "States", meaning the signatory countries and not local governments.

The Prudential Insurance Company has obtained the permission of the New Jersey Department of Insurance to "write" the coverage called for by the SCP.

William A. White, Chief Actuary of the Department of Insurance of the State of New Jersey has written.[2]

> "The statutory authority for our approval of Prudential's Supplemental Compensation Plan under the 'Guatemala Protocol' is to be found in the provisions with regard to 'blanket' group health insurance contained in N.J.S.A. 17B:27:32.
>
> ***
>
> With regard to the 'premium' to be charged, I would advise you that the New Jersey Department does not approve group insurance rates. As I am sure you are aware the assumptions underlying the charge to be made for coverage under the Plan together with experience simulations utilizing those assumptions are set forth in Attachment B to the 'Comments in Support of Supplemental Compensation Agreement' filed with the Civil Aeronautics Board on August 26, 1975. Based on these assumptions the proposed Plan Surcharge seems reasonable." (Emphasis supplied)

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[2] Letter to Kreindler & Kreindler dated December 16, 1975.

"Group health insurance" policies do not have any compulsory "premium" features, and are not comparable to the Supplemental Compensation Plan. Such qualified approval, however, is wholly inadequate to satisfy Article 35A of the proposed Guatemala Protocol. Insufficiency of New Jersey approval buttresses the argument that an Act of Congress is required to implement the mandatory limited benefit program embodied in the SCP.

Furthermore, the C.A.B. has no authority or competence to grant an anti-trust exemption to Prudential. As indicated above the C.A.B.'s power extends to air carriers only, not to insurance companies.

Assuming for the sake of argument only that the C.A.B. does have authority to approve the SCP, it must make an "informed assessment" and evaluation of the competing public interests. National Air Carrier Assoc. v. C.A.B., 436 F.2d 185 (D.C. Cir. 1970). It must conclude that the anti-competitive aspects of the SCP are outweighed by the alleged benefits which the Plan would offer.

> "The Board's own prior decisions also support the assertion that colorable antitrust claims should be considered substantively important. In IATA Credit Agreements, 30 C.A.B. 1553, 1554-1555 (1960), the Board ruled that when IATA resolutions appear on their face to be repugnant to antitrust principles, they cannot be approved under section 412 'unless their proponents have made a clear showing of the need for approval to fill (a) serious transportation need or secure important public benefits.' This principle has been an established aspect of the Board's regulatory policy

> since the Local Cartage Agreement Case, 15 C.A.B. 850, 853 (1952). Moreover, in Volumair Agreement, 30 C.A.B. 1007, 1008 (1960), the Board specifically noted the relationship between the need for a hearing under section 412 and the likelihood that the agreement in question would alter the competitve roles of the scheduled and supplemental carriers. Finally, with respect to the complexity of the issues raised, we have recently noted that 'summary procedures are held to have only limited scope in antitrust litigation,' particularly when there is a question of predatory intent as in the present case. Citizens for Allegany County, Inc. v. FPC, supra, 134 U.S. App. D.C. at 232-233, 414 F.2d at 1128-1129."
>
> See, U.S. v. C.A.B., 511 F.2d 1315 (D.C. Cir. 1975)

Among the anti-trust and anti-competitive consequences of the SCP are the following

First: International airline passengers will be required to purchase accident insurance at a rate not influenced by the marketplace and from one company only.

Second: As a practical matter insurance carriers, other than Prudential will be deprived of a substantial portion of the international aviation death/accident insurance coverage written. Prudential will effectively monopolize the international aviation insurance market for death or injury. When advised of the purpose of the $2 surcharge passengers will not purchase alternate coverage.

Third: Prudential gains an unfair advantage over its competitors in the insurance field in terms of public exposure. In so doing Prudential exhibits a "predatory intent" which is contrary to anti-trust principles.

Furthermore, the result of these anti-competitive consequences of the SCP do not "secure important public benefits". They secure a system of limited liability on the part of airlines (as opposed to unlimited liability, which should be the rule) and substitute a system of limited mandatory insurance for the unlimited liability regime which should exist. The system only promotes the private interests of the air carriers.

> "The Board has no recourse, but to disapprove agreements it considers to be inconsistent with the public interest not only from the standpoint of policy, but [also] in the discharge of its statutory obligations.
>
> Thus, while the Board is free to ascribe some weight to the international overtones of an agreement, it obviously cannot allow those considerations to become determinative." National Air Carrier Assoc. v. C.A.B. supra at 192-193 citing IATA Agreements Re Passenger Fares 38 CAB 1062, 1063 (1963)

"International considerations" may not inhibit a realistic assessment of the SCP and Guatemala Protocol. We submit that such a realistic and fair assessment of the SCP dictates that it not be allowed to become effective.

It is worth reiterating: This is not a compensation plan, despite its artful packaging. It is a system of mandatory insurance imposed on passengers at their expense for the purpose of preserving the airlines' system of limited liability.

In his State of the Union message to the Congress on January 19, 1976, the President of the United States declared that in his program of "new realism" antitrust laws would be "strictly enforced" and consumer prices would thereby be decreased.

For the C.A.B. to approve this SCP would be to promptly contradict or cast doubt on the credibility of the President -- for the price of a consumer-passenger's ticket would be needlessly increased and the anti-trust laws loosely applied.

POINT V

THE PROPOSED SCP IS CONTRARY TO THE PUBLIC INTEREST.

A) The SCP Is an Essential Part of a Package That Would Deny Airline Passengers Reasonable Damages for Personal Injury or Death.

The Guatemala Protocol and SCP, if allowed to become effective will continue to deprive a substantial percentage of airline accident victims or their heirs reasonable compensatory damages for death or personal injury sustained in the course of international transportation by air.

The United States has long asserted that one of its objectives was securing reasonable damages for victims of air disasters in international transportation. The United States' denunciation of the Warsaw Convention in 1965, later withdrawn when the Montreal Agreement was signed in 1966, and recognition in 1970 and 1971 that the $100,000 Guatemala Protocol limit was inadequate compensation to American victims is proof of this overriding concern. Similarly the government's demand in 1970 that a viable supplemental plan allow recovery of $200,000 additional provable damages was another manifestation of this concern.

This "public interest" of securing adequate damages for American victims of air crashes will not be served by the SCP.

According to a C.A.B. study in 1970 23.9% of non-Warsaw recoveries for passenger deaths or serious injuries in airplane accidents exceeded $300,000 and 63.7% exceeded $100,000. These revelations prompted the U.S. to require that $200,000 in supplemental benefits be made available for Americans and permanent residents of the United States. A limited "unofficial" study made available recently by the C.A.B. indicates that in the first six (6) months of 1974 the percentage of recoveries in excess of $300,000 continued to escalate. The trend clearly is toward higher recoveries. Nonetheless, the proposed SCP continues to be limited to $200,000 sought in 1970 and 1971.[3]

The inadequacy of the SCP becomes even more apparent when examined in light of the continuing diminishing purchasing power of the dollar since 1970. The U.S. Department of Labor, Bureau of Labor Statistics recently issued a report on the U.S. City Average, Purchasing Power of the Consumer Dollar (1957-59 = $1.00). The report observed that in January, 1970 the purchasing power of the dollar was $0.759.

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[3] The staff of the C.A.B. has evidently declined to up-date the study beyond mid 1974 despite the strong indication that it would show substantially higher recoveries since then.

By June, 1975 the purchasing power of the dollar fell to $0.535, a drop of about 30%. The purchasing power today of a $300,000 award is, therefore, the equivalent of $210,000 in 1970 dollars. In other words the real value of the SCP benefits today is two-thirds of what it was when the plan was first considered.

Not only are the SCP damage limitations inadequate, but they will grow increasingly so from year to year. A plan which provides compensatory damages based upon a regressive standard is contrary to the public interest when the needs to be served by recoveries are subject to inflation. Erosion of the purchasing power of the dollar since 1970 is not reflected in the 1975 SCP nor is there any mechanism suggested by which the plan benefits may keep pace with inflation. As a result, a majority of airline accident victims or their heirs will be denied just compensation if the SCP becomes effective as submitted.

No "public interest" is served by denying victims of aviation accidents adequate recoveries for their losses. The C.A.B., which must serve the "public interest", should reject the SCP.

There has been no demonstration of why air carriers, alone in our society should have the windfall of limited liability, and yet that is a consequence of continuation of the Warsaw-Guatemala system.

It is clear that absent the SCP the Guatemala Protocol will not be adopted and absent the Guatemala Protocol the United States will abandon the Warsaw system of limited liability. This would be in the public interest and, for this reason the Board should reject the SCP.

In addition the cost of the scheme to the passenger appears to be excessive. Although it hasn't been developed by any economic data, which should have been submitted with this application, we understand that the cost of unlimited liability to an airline in domestic transportation, which we believe has a higher loss experience than international, is approximately fifty cents a passenger. This liability insurance cost is borne by the airlines not the passenger. The most that can be said is that it gets passed on to the passenger in the form of a slightly higher fare.

The cost of the Guatemala-SCP system will consist of the cost to the airline of insurance for the first $100,000 liability under Guatemala, plus an initial charge of $2 to the passenger.

Thus under the initial charge it would appear that the cost to the passenger will be over four times as much as the present domestic system.

Furthermore, it appears that the initial charge will be increased. One of the original conditions imposed by the ICIA and articulated by Mr. Boyle at the meeting in September, 1972 was that the charge imposed on the passenger be no more than $2. The proposed SCP does not meet this condition. It provides for an initial charge of $2 which may be increased later. The fact that IGIA was not able to get a bid from a prospective "contractor" with a maximum charge of $2 per passenger despite the lucrative guaranteed profits and coverage of expenses to a contractor strongly suggests that the charge will go higher despite Prudential's "scenarios" by computer. If Prudential believed its scenarios, the "initial charge" would be a maximum charge, and not an "initial charge".

It would also be a mistake to assume that the maximum benefit of $200,000 under the SCP will be freely paid by Prudential. With a maximum expense of $200,000, it is certain to attempt to save what it can. There is no "settlement inducement" provision in the SCP as there is in the Guatemala Protocol itself.

Thus the Guatemala-SCP scheme provides expense to the passenger which is too great and benefits which are limited, and too small.

At various times in the history of Guatemala and the SCP the representatives of our Government have articulated a standard of 90% or 80%. They have said that an acceptable system must fully compensate 90%, or 80% of accident victims, in accordance with the statistics on recoveries in unlimited domestic travel. The proposed Guatemala-SCP system does not meet that standard even under the mid-1974 statistics, let alone current or future experience.

B) The Guatemala-SCP Package Would Eliminate Examinations into Responsibility for Airplane Accidents.

The Guatemala Protocol makes the air carrier absolutely liable for damages up to the Protocol limit and eliminates liability above that. The Protocol provides that the airline's limit of liability cannot exceed $100,000 no matter how outrageous its conduct. No action for indemnification or contribution by a third-party, such as a manufacturer or air traffic facility can enlarge this financial exposure. The benefits payable under the proposed SCP have no financial impact upon the air carriers at all since they are funded by the $2 surcharge on passengers.

Even under the Warsaw Convention where an air carrier is guilty of "wilful misconduct" the damage limitation does not apply. This "accountability" has helped to elevate standards of air safety and promote the purposes expressed in the Federal Aviation Act. The investigation process which necessarily is a critical element of the traditional tort litigation process has frequently disclosed areas of inadequacies in airline maintenance and operation and has significantly supplemented the work of government investigatory agencies such as the National Transportation Safety Board.

The fixing of responsibility and revelation of errors has served the public interest by inducing accident prevention measures. The proposed Guatemala-SCP package would contravene the public interest by eliminating the process. Limiting the liability of airlines induces otherwise unnecessary suits against third-parties, such as aircraft and component manufacturers and the Government, for the operation of air traffic control, and will require them to carry the airlines' burden.

This is morally wrong and inconsistent with law and custom of our social and judicial system especially where there is no economic justification or well-recognized national interest served by the practice of arbitrarily limiting the liability of one potential wrongdoer.

Recent court decisions in this country and state legislation concerning the rules of comparative negligence and contribution and indemnity demonstrate the continuing importance attached to the rejection of rules which do not apportion responsibility in accordance with relative fault. *Dole* v. *Dow Chemical* 30 N.Y.2d 143, 331 N.Y.S.2d; *Nga Li* v. *Yellow Cab Company*, 382, 282 N.E.2d 288, 13 Cal.3d 733, 46 Cal.App. 3d 1(1975); N.Y. Gen. Obligations Law §15-108.

In *Nga Li* v. *Yellow Cab Company* the Court said:

> "It is unnecessary for us to catalogue
> the enormous amount of critical comment
> that has been directed over the years

> against the "all-or-nothing" approach of the doctrine of contributory negligence. The essence of that criticism has been constant and clear: the doctrine is inequitable in its operation because it fails to distribute responsibility in proportion to fault. Against this have been raised several arguments in justification, but none have proved even remotely adequate to the task. The basic objection to the doctrine -- grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability -- remains irresistible to reason and all intelligent notions of fairness."

The proposed Guatemala-SCP scheme so dramatically contravenes our traditional notions of justice, fair play and encouragement of safe practices that rejection of the scheme is compelled by the public interest.

Rejection of the scheme will almost certainly mean denunciation by the United States of the Warsaw Convention and elimination of the system of limited liability, which is all to the good. But even the present international liability system of Warsaw plus the Montreal Agreement is better than the Guatemala-SCP proposal. There are ways and means of defeating the limitation under Warsaw-Montreal, and idemnity and contribution are available by a third-party against an airline. Tort cases are brought against airlines under Warsaw-Montreal and the safety-deterence system is not frustrated.

POINT VI

THE PROPOSED SCP IS UNCONSTITUTIONAL IN THAT IT IS PART OF A SCHEME THAT DISCRIMINATES AMONG DEFENDANTS, DOES NOT PROVIDE EQUAL PROTECTION OF THE LAWS, OR DUE PROCESS, AND IMPINGES UPON THE FREEDOM TO TRAVEL.

The Guatemala Protocol and SCP combine to accord air carriers preferential status vis-a-vis two classes: the manufacturers of aircraft and their component parts and other potential tort-feasors, such as the United States itself, and the passengers. This discrimination violates the "due process" clause of the Fifth Amendment to the United States Constitution.

The concept of equal protection prohibits the federal government from adopting legislation or authorizing classifications which are arbitrary or irrational or which fail to accord all persons similarly situated the same rights and privileges. Schneider v. Rusk, 377 U.S.163, 168, 84 S.Ct. 1187, 12 L.ed. 2d 218 (1964); Dept. of Agriculture v. Moreno, 413 U.S.528, 93 S.Ct. 2821, 37 L.ed. 2d 782 (1973).

> "Under traditional equal protection analysis, a legislative classification must be sustained if the classification itself is rationally related to a legitimate governmental interest. See Jefferson v. Hackney, 406 U.S. 535, 546, 32 L.Ed. 2d 285, 92 S. Ct. 1724 (1972); Richardson v. Belcher, 404 U.S. 78, 81, 30 L.Ed. 2d 231, 92 S.Ct. 254 (1971);

Dandridge v. Williams, 397 U.S. 471,
485, 25 L.Ed. 2d 491, 90 S.Ct. 1153
(1970); McGowan v. Maryland, 366 U.S.
420, 426, 6 L.Ed. 2d 393, 81 S.Ct. 1101
(1961)." 413 U.S. 528, 534

The aircraft manufacturers and other potential tort-feasors are discriminated against by the SCP and Guatemala in that they will be forced to assume damage obligations disproportionate to their degree of fault. The liability of an airline, 90% responsible for an accident, will be limited to $100,000 per passenger, but the liability of the 10% responsible manufacturer will be unlimited.

Passengers are discriminated against in that they are denied adequate damages while air carriers are insulated from the payment of such damages. These "classifications" must serve a legitimate statutory or other constitutionally acceptable purpose or they must be declared in violation of due process and equal protection clauses.

Accordingly unless it can be demonstrated that the Guatemala-SCP scheme enhances the "safe and efficient" use of American airspace, promotes "public convenience and necessity" (49 U.S.C.§1302) or serves another national interest without discrimination, its "classification" scheme is unconstitutional. The SCP has nothing whatsoever to do with "safe and efficient" air travel nor does it aid "public convenience and necessity". To the contrary, it is an essential part of a limited liability scheme in derogation of the right to full recovery for airlines' wrongdoing.

Furthermore, the discriminatory classifications of Guatemala, of which SCP is an essential part, must be examined in the perspective of the original purpose of the Warsaw Convention, namely the financial protection of the then infant international airline industry. That purpose has long since been fulfilled. International airlines have grown into a major industry fully capable of assuming the costs of insuring themselves against losses. There has been no showing in this record or elsewhere that airlines require special protection not available to manufacturers, for example.

The Guatemala Protocol of which the SCP is now an essential part denies "equal protection" to other potential defendants in aviation accident cases. Even under the Warsaw Convention non-airline defendants who paid more than their share of damages in respect of a particular air disaster could seek indemnification or contribution from the airline. The Guatemala Protocol, by limiting the air carriers' liability to approximately $100,000 without exception impairs those rights. The airlines' right to seek indemnification or contribution from the manufacturers is, however, preserved.

The SCP is, furthermore, unconstitutional, and hence unenforceable, in that it requires a $2 mandatory surcharge, which, if not paid will bar a traveller's departure from the United States. As such it violates the First Amendment in that it impinges upon the constitutionally protected freedom to travel. See, Kent v. Dulles, 357 U.S. 116 (1958); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

In Memorial Hospital v. Maricopa County the Supreme Court observed

> "'Shapiro [v. Thompson, 394 U.S. 618 (1969)] did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this court always relied on the presence of actual deterrence. In Shapiro we explicitly stated that the compelling-state-interest test would be triggered by "any classification which serves to penalize the exercise of that right [to travel]. . ." (Emphasis in original).'" 415 U.S. 250, 258 (1974)

In terms of "power" the SCP has the same effect as the obligation to have a valid passport as a condition to departure from the United States. Internal Security Act of 1950, 64 Stat.9873, 50 U.S.C.§781; Act of June 27, 1952, §215, 66 Stat. 190, 8 U.S.C.§1185. As such the exercise of such a power must serve a "compelling state interest" Shapiro v. Thompson, 394 U.S. 618 (1969)

For the $2 mandatory surcharge to be enforceable and collectible there must be, aside from statutory authorization, a showing that the limited liability system as expressed in the Guatemala Protocol and SCP serves a more compelling state interest than allowing unlimited recovery to American victims of airplane disasters. We submit that no such "state interest" is served by the SCP in these circumstances. At least to the extent, therefore, that it relies upon mandatory collections, the SCP is unconstitutional and cannot be approved.

POINT VII

INSUFFICIENT ECONOMIC DATA HAS BEEN SUBMITTED TO WARRANT THE RADICAL LIMITATION OF RIGHTS WHICH WOULD BE TRIGGERED BY APPROVAL OF THE SCP.

The application filed by the ATA for approval of the SCP is fatally defective in that it fails to offer sufficient economic data to justify an extension of limited liability system of airlines, and in particular, the system contemplated by the Guatemala-SCP combination. The Board may not act in the absence of a sufficient factual record, United States v. C.A.B., 511 F.2d 1315 (D.C. Cir. 1975); National Air Carrier Association v. C.A.B., 436 F.2d 185 (D.C. Cir. 1970). Both logic and historical precedent dictate that such a showing be made.

The whole concept of "limited liability" for airlines has been predicated upon international airlines' asserted financial inability to sustain the losses which claims for death or personal injury of passengers might impose upon them. Nevertheless, the ATA has stated in its Application herein that there is no "economic data or other material which applicants wish the Board to officially notice". ATA Application p. 5. It may reasonably be assumed that ATA's unwillingness to file economic data is based upon its knowledge that such data will render untenable the argument that perpetuating limited liability and the $2 surcharge is economically necessary.

The SCP should not be acted upon by the C.A.B. unless an evidentiary hearing is held at which time the ATA would disclose:

1. The relative costs between the Guatemala-SCP system and unlimited liability as in domestic U.S. air transportation. We believe that the cost of this system of limited liability is 400% more than the domestic system of unlimited liability. This information must surely be available to the airlines, Prudential and airlines' insurance underwriters;
2. The costs which airlines presently incur in providing limited liability for death or injury;
3. The economic impact which any increase in the cost of purchasing unlimited liability coverage would have on their operations;
4. Whether economies can be instituted or whether funds are or may become available from general operating revenues to meet any increase in cost required to provide unlimited liability coverage.
5. Whether any increase in the general rate or fare structure of the international airlines to meet the cost of increased insurance costs would materially and adversely affect the airline or international transportation.

The record placed before the C.A.B. by the ATA is inadequate to warrant the radical changes which approval of the SCP would precipitate.

It is odd that this is so. The Air Transport Association has known for months that the SCP would be challenged on this basis.

Indeed it is noteworthy that the ATA application does not address the question of statutory authority or the anti-trust implications of the proposed SCP. The ATA has known for months that these questions also were in issue.

POINT VIII

WERE THIS A GOOD FAITH EFFORT TO COMPENSATE PASSENGERS IT WOULD BE AT AIRLINE EXPENSE AND HAVE NO LIMIT.

The proposed SCP is not a good faith effort to provide compensation for passengers. It is a self-serving, selfish effort on the part of airlines to secure a limit of their own liability.

The record of the airlines in this field has been dismal. For years they advanced and maintained a "notice of claim" requirement, until that practice was ended by the Board. For years they maintained the Warsaw Convention limit of $8,300. Then they pushed the Hague Protocol with a then limit of $16,600. Their record bespeaks proprietary interest and selfishness unbecoming a great industry.

The proposed SCP is now advanced because it is the only way the airlines can possibly achieve United States ratification of the Guatemala Protocol, and without the Guatemala Protocol the Warsaw Convention and the system of limited liability will collapse.

If the airlines want to genuinely provide a true passenger "compensation" system their course is clear. They would propose a plan under which:

1. The airlines would pay the cost.
2. They would recognize their liability for personal injuries or death in the course of transportation.
3. They would provide benefits without an artificial and arbitrary limit.

Such a plan would, also, suffer the disadvantage of eliminating the fixing of responsibility for accidents and the unearthing of safety deficiencies in aviation, which are attributes of the tort system. But such a plan would be a genuine effort to compensate.

The current SCP, packaged and perfumed as a "compensation plan" is not.

CONCLUSION

For all of the reasons stated above, the Supplemental Compensation Plan to the Warsaw Convention as amended should not be approved by the C.A.B.

ASSOCIATION OF TRIAL LAWYERS
OF AMERICA, by
Ward Wagner, President
and
Lee S. Kreindler, Chairman
Committee on International
Aviation

Please serve replies on

ASSOCIATION OF TRIAL LAWYERS
OF AMERICA
Joseph G. O'Neill
Director
120 I Street, N.W.
Washington, D.C. 20006

Lee S. Kreindler, Esq.
KREINDLER & KREINDLER
99 Park Avenue
New York, New York 10016

Dated: January 21, 1976

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D.C.

--x

Agreement Among Certain Air Carriers Serving the United States and Prudential Insurance Company of America Establishing Supplemental Compensation Plan Pursuant to the Guatemala Protocol Amending the Warsaw Convention as Amended by The Hague Protocol	Docket 28713 Agreement CAB

--x

REQUEST FOR AN EVIDENTIARY HEARING AND ORAL ARGUMENT

PLEASE TAKE NOTICE that the American Trial Lawyers Association, which opposes approval of the "Application for Prior Board Approval of Agreements" filed by the Air Transport Association of America on December 31, 1975, relating to the Supplemental Compensation Agreement developed pursuant to Article XIV of the Guatemala Protocol, hereby requests that formal evidentiary hearings and oral argument be scheduled by the Civil Aeronautics Board with respect to the said Application. Such hearings and argument would permit, and the Board should require, that the applicant submit all studies, reports, and statistics on the cost of current airline liability systems as well as the cost of the proposed

Guatemala Protocol coverage. It would further assist the Board in its analysis of the substantial and complex issues presented by the proposed Supplemental Compensation Plan.

ASSOCIATION OF TRIAL LAWYERS
OF AMERICA, by
Ward Wagner, President
and
Lee S. Kreindler, Chairman
Committee on International
Aviation

Please serve replies on

ASSOCIATION OF TRIAL LAWYERS
OF AMERICA
Joseph G. O'Neill
Director
120 I Street, N.W.
Washington, D.C. 20006

Lee S. Kreindler, Esq.
KREINDLER & KREINDLER
99 Park Avenue
New York, New York 10016

Dated: January 21, 1976

CERTIFICATE OF SERVICE

I, Lee S. Kreindler certify that on the 21st day of January, 1976 copies of the foregoing STATEMENT IN OPPOSITION TO THE PROPOSED SUPPLEMENTAL COMPENSATION PLAN PURSUANT TO THE GUATEMALA PROTOCOL and REQUEST FOR EVIDENTIARY HEARING AND ORAL ARGUMENT were served upon all parties listed in the annexed schedule by ordinary mail, postage prepaid.

LEE S. KREINDLER

January 21, 1976

Attachment "C"

SERVICE LIST

Carriers Holding Certificates of Public Convenience and Necessity in Accordance with Section 401 of the Federal Aviation Act

Airlift International, Inc.
Paul Finazzo, Chrmn. of the
Board, Pres. and Chief Exec.
Box 480535
Miami International Airport
Miami, Florida 33148

Air Micronesia, Inc.
F. Norton Davey, Controller
c/o Continental Airlines, Inc.
Los Angeles Int'l Airport
Los Angeles, California 90009

Air New England, Inc.
Joseph C. Whitney, President
Logan International Airport
East Boston, Massachusetts 02128

Alaska Airlines, Inc.
Ronald F. Cosgrave, Chrmn of the
Board and Chief Executive Officer
Seattle-Tacoma International Airport
Seattle, Washington 98158

Allegheny Airlines, Inc.
Edward I. Colodny, President and
Chief Executive Officer
Washington National Airport
Hangar 12
Washington, D.C. 20001

Aloha Airlines, Inc.
Kenneth F. C. Char, President
Honolulu International Airport
P.O. Box 30028
Honolulu, Hawaii 96820

American Airlines, Inc.
Albert V. Casey, Chrmn. of the
Board and President
633 Third Avenue
New York, New York 10017

Aspen Airways, Inc.
Gerald B. Hickman, Chrmn. of the
Board and President
Stapleton International Airport
Hangar 5
Denver, Colorado 80207

Braniff Airways, Inc.
Harding L. Lawrence, Chrmn. of the
Board and Chief Exec. Officer
P.O. Box 35001
Dallas, Texas 75235

Capitol International Airways, Inc.
Jesse F. Stallings, Chrmn. of the
Board and President
Box 325
Smyrna, Tennessee 37167

Chicago Helicopter Airways, Inc.
John S. Gleason, Jr., President
and Treasurer
5315 West 63rd Street
Chicago, Illinois 60638

Continental Air Lines, Inc.
Robert F. Six, Chrmn. of the
Board and Chief Exec. Officer
Los Angeles International Airport
Los Angeles, California 90009

Delta Air Lines, Inc.
W. T. Beebe, Chrmn. of the
Board and Chief Exec. Officer
Hartsfield-Atlanta Int'l Airport
Atlanta, Georgia 30320

Eastern Air Lines, Inc.
Floyd D. Hall, Chrmn. of the
Board and Chief Exec. Officer
Miami International Airport
Miami, Florida 33148

The Flying Tiger Line, Inc.
Robert W. Prescott, President
7401 World Way West
Los Angeles International Airport
Los Angeles, California 90009

Frontier Airlines, Inc.
A. L. Feldman, President and
Chief Executive Officer
8250 Smith Road
Denver, Colorado 80207

Hawaiian Airlines, Inc.
John H. Magoon, Jr., Chrmn. of
the Board, Pres. and Chief Exec.
P. O. Box 30008
Honolulu International Airport
Honolulu, Hawaii 96820

Hughes Airwest
Irving T. Tague, General Mgr.
San Francisco Int'l Airport
San Francisco, California 94128

Johnson Flying Service, Inc.
Jack R. Hughes, President
and Chief Executive Officer
Box 1366
Missoula, Montana 59801

Kodiak-Western Alaska Airlines, Inc.
Robert L. Hall, President
Box 2457
Kodiak, Alaska 99615

McCulloch International Airlines
John E. Gallagher, President
and Chief Executive Officer
Long Beach Municipal Airport
2735 East Spring Street
Long Beach, California 90806

Modern Air Transport, Inc.
S. Hayward Wills, Chrmn. of the
Board and President
Box 480627, MIAB
Miami, Florida 33148

Munz Northern Airlines, Inc.
D. Galleher, President
and General Manager
Box 790
Nome, Alaska 99762

National Airlines, Inc.
Lewis B. Maytag, Chrmn. of the
Board and President
P.O. Box 592055, A.M.F.
Miami, Florida 33159

New York Airways, Inc.
Warren A. Fucigna, President
P.O. Box 426
LaGuardia Airport Station
Flushing, New York 11371

North Central Airlines, Inc.
Hal N. Carr, Chrmn. of the
Board and Chief Exec. Officer
7500 Northliner Drive
Minneapolis, Minnesota 55450

Northwest Airlines, Inc.
Donald W. Nyrop, President
Minneapolis-St. Paul Int'l. Airport
St. Paul, Minnesota 55111

Overseas National Airways, Inc.
J. W. Bailey, President and Chief
Operating Officer
JFK International Airport
Jamaica, New York 11430

Ozark Air Lines, Inc.
Edward J. Crane, President
and Chief Exec. Officer
Box 10007, Lambert Field
St. Louis, Missouri 63145

Pan American World Airways, Inc.
William T. Seawell, Chrmn. of the
Board, President and Chief Exec.
Pan Am Building, 200 Park Avenue
New York, New York 10017

Piedmont Aviation, Inc.
T. H. Davis, President and Treas.
P. O. Box 2720
Smith Reynolds Airport
Winston Salem, North Carolina 27102

Reeve Aleutian Airways, Inc.
Robert C. Reeve, President
Box 559
Anchorage, Alaska 99510

SFO Helicopter Airlines, Inc.
Richard C. Lovorn, President
Box 2525
Metropolitan Oakland Int'l. Airport
Oakland, California 94614

Saturn Airways, Inc.
Howard K. Howard, President
and Chief Operating Officer
Box 2426
Oakland International Airport
Oakland, California 94614

Seaboard World Airlines, Inc.
Richard M. Jackson, President
and Chairman of the Board
Seaboard World Building
JFK International Airport
Jamaica, New York 11430

Southern Airways, Inc.
Frank W. Hulse, President
Hartsfield-Atlanta Int'l Airport
Atlanta, Georgia 30320

Texas International Airlines, Inc.
Francisco A. Lorenzo, President
Box 12788
Houston, Texas 77017

Trans International Airlines, Inc.
Henry P. Huff, President
P. O. Box 2504, Airport Station
Oakland International Airport
Oakland, California 94614

Trans World Airlines, Inc.
Charles C. Tillinghast, Jr.,
Chrmn. of the Board, President
and Chief Executive Officer
605 Third Avenue
New York, New York 10016

United Airlines, Inc.
Edward E. Carlson, Chrmn of the
Board and Chief Exec. Officer
Box 66100
O'Hare International Airport
Chicago, Illinois 60666

Western Air Lines, Inc.
Arthur F. Kelly, President
and Chief Executive Officer
Box 92005, World Way
Postal Center
Los Angeles, California 90009

Wien Air Alaska, Inc.
Raymond I. Petersen, Chrmn.
of the Board and President
4100 International Airport Road
Anchorage, Alaska 99502

World Airways, Inc.
Edward Daly, President
and Chrmn of the Board
Oakland Int'l Airport
Oakland, California 94614

Wright Air Lines, Inc.
Don Schneller, Chrmn. of the
Board and President
Burke Lakefront Airport
Cleveland, Ohio 44114

Carriers Holding Permits in Accordance with Section 402 of the Federal Aviation Act

Aerlinte Eireann Teoranta
(Aer Lingus-Irish)
N. G. Weldon, Corp. Secretary
Box 180, Dublin Airport
Dublin, Ireland

Aeroflot, "Soviet Air Lines"
Gen. Dept. of Int. Air Service
Stanislav Gordievsky, Commercial
Manager - U.S.
545 Fifth Avenue
New York, New York 10017

Aerolineas Argentinas
Lawrence W. Levine, Agent
Walsh & Levine
64 Wall Street
New York, New York 10005

Aeromar, C. por A.
Boros & Garofalo
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Aeromexico
Michael Harris, Agent
Skadden, Arps, Slate
919 Third Avenue
New York, New York 10022

Aero Peru
J. Eduardo Chavez
Dupont Plaza Center
300 Biscayne Blvd. Way
Miami, Florida 33131

Aerovias Condor de Columbia, S. A.
(Aerocondor)
Jose Alarcon, U.S. Controller
Box 48-0162
Miami International Airport
Miami, Florida 33148

Aerovias Nacionales de Columbia, S.A.
(Avianca)
Alberto Farias
6 West 49th Street
New York, New York 10020

Aerovias Quisqueyana, C. por A.
Mrs. Lugarda Sanchez
Box 4615
San Juan, PR 00905

Air Afrique
Henri G. Marescot
1350 Avenue of the Americas
New York, New York 10019

Air BVI Limited
Peter M. Armour, Exec.
Vice President
Box 85
Road Town, Tortola
British Virgin Island

Air Canada
Albert F. Grisard, Agent
412 Metropolitan Bank Building
Washington, D.C. 20005

Air India
James J. Greene
Charter Officer
345 Park Avenue
New York, New York 10022

Air Jamaica (1968) Ltd.
Patrick R. Simmons, Secretary
72-76 Harbour Street
Kingston, Jamaica, W.I.

Air Manila, Inc.
Ricardo C. Silverio, Chrmn. of the
Board and President
Domestic Terminal Drive
Nichols Pasay City
Republic of the Philippines

Air Nauru
Wilmer, Cutler & Pickering
A. T. A. McDonald
1666 K Street, N.W.
Washington, D.C. 20036

Air New Zealand, Ltd.
Donald Keith Hall, Agent
Darling, Hall, Rae & Gute
400 Pacific Mutual Building
523 West Sixth Street
Los Angeles, California 90014

Air Panama International
James M. Verner, Agent
Verner, Liipfert, Bernhard &
McPherson
1660 L Street, N.W., Suite 1100
Washington, D.C. 20036

Air Siam Air Co., Ltd.
Theodore I. Seamon, Agent
Seamon & Wasko
1211 Connecticut Avenue, N.W.
Suite 300
Washington, D.C. 20036

Air Zaire
Jerry W. Ryal, Agent
Reavis, Pogue, Neal & Rose
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Alia - The Royal Jordanian Airlines Corp.
Ali Ghandour, Chrmn. of the Board
and President
P.O. Box 302
Amman, the Hashemite
Kingdom of Jordan

Alitalia-Linee Aeree Italiane, S. por A.
Robert R. Littlefair, Sp Flight
Representative for North America
666 Fifth Avenue
New York, New York 10019

A.L.M. Dutch Antillean Airlines
Robert C. Lester, Agent
1735 I Street, N.W., Suite 611
Washington, D.C. 20005

Aviacion Y Comercio, S.A.
(AVIACO)
Joaquin Abril, Managing Director
51 Calle Maudes
Madrid 3, Spain

Bahamasair Holdings Ltd.
J. Simpson, Agent
Koteen & Burt
1000 Vermont Avenue, N.W.
Washington, D.C. 20005

Balair Ltd.
Otto Gersbach, Managing Director
Box 173
4002 Basel, Switzerland

British Airtours, Ltd.
Terence M. Ankers
Airtours House
Getwich Airport
Harley, Surrey, England

British Airways
William C. Clarke
245 Park Avenue
New York, New York 10017

British Caledonian Airways (BCAL)
Leonard N. Bebchick, Agent
Martin, Moore, Thaler & Whitfield
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

British Midland Airways, Ltd.
Paul Reiber, Agent
1625 I Street, N.W.
Washington, D.C. 20006

British West Indian Airways, Ltd.
Berl Bernhard, Agent
1660 L Street N. W.
Suite 1100
Washington, D.C. 20036

Canadian Pacific Air Lines, Ltd.
C. F. O'Brien, Vice President -
Finance and Accounting
1900 Granville Square
200 Granville Street
Vancouver, B.C. V6C 2R1,
Canada

Carib West Airways, Ltd.
Trevor Mayers, President
Seawell International Airport
Christchurch
Barbados, West Indies

Cayman Airways, Ltd.
Robert D. Papkin, Agent
Cox, Langford & Brown
21 Dupont Circle, N. W.
Washington, D.C. 20036

Ceskoslovenske Aerolinie
Richard Ganan, Mgr. - Tour Sales
545 Fifth Avenue
New York, New York 10017

China Airlines, Ltd.
Carl C. H. Ma, Vice Pres. -N.A.
391 Sutter Street
San Francisco, California 94108

Compagnie Nationale Air France
(Air France)
Henri G. Marescot, Vice Pres.
and General Manager
1350 Avenue of the Americas
New York, New York 10019

Compagnie Nationale de Transports
Aeriens (Royal Air Maroc)
Abdeslam Ouriaghli
683 Fifth Avenue
New York, New York 10022

Compania Dominicana de Aviacion
C. por A.
Talbot S. Lindstrom, Agent
1730 Pennsylvania Avenue, N. W.
Washington, D.C. 20006

Compania Mexicana de Aviacion,
S.A. (Mexicana)
Robert Papkin, Agent
Cox, Langford & Brown
21 Dupont Circle, N. W.
Washington , D.C. 20036

Condor Flugdienst G. m. b. H.,
Sub-Lufthansa German Airlines
G. Nathan Calkins, Agent
Galland, Kharasch, Calkins & Brown
1054 31st Street, N. W.
Washington, D.C. 20007

Dan-Air Services, Ltd.
Lester M. Bridgeman
1750 New York Avenue, N. W.
Suite 210
Washington, D.C. 20006

East African Airways Corp.
Robert M. Beckman, Agent
1001 Connecticut Avenue, N. W.
Suite 235
Washington, D.C. 20036

Egyptair
Abdelaziz I. Eid, Mgr. USA
720 Fifth Avenue
New York, New York 10019

El Al Israel Airlines, Ltd.
Mary Rose Sargiss, Sp Flight Dept.
850 Third Avenue
New York, New York 10022

Empresa Ecuatoriana de Aviacion
(Ecuatorian)
Col. Jaime Mĩno Gallo, US Rep.
Miami International Airport
Bldg. 1006 at N. W. 62nd Avenue
Miami, Florida 33148

Empresa Guatemalteca de Aviacion
(Aviateca)
Carlos A. Randi Klee
Hotel Everglades
Biscayne Boulevard
Miami, Florida 33159

Finnair OY
August J. Herkert, Admin.
Manager - North America
10 East 40th Street
New York, New York 10016

Germanair Bedarfsluftfahrt
GmbH & Co. KG.
Flughafen bereich Sued
6 Frankfurt/Main
Germany

Iberia Air Lines of Spain
Alfredo Fuchs, Vice President
and General Manager
97-77 Queens Boulevard
Rego Park, New York 11374

Icelandic Airlines, Inc.
(Loftleidir Icelandic)
S. Helgason
630 Fifth Avenue
New York, New York 10020

Internacional de Aviacion, S. A.
(INAIR)
Box 911, IAB
Miami, Florida 33148

Iran National Airlines Corp.
(Iran Air)
Robert D. Papkin, Agent
Cox, Langford, & Brown
21 Dupont Circle, N.W.
Washington, D.C. 20036

Japan Air Lines, Co., Ltd.
Kiichi Ito, Vice President The Americas
655 Fifth Avenue
New York, New York 10022

Jugoslovenski Aerotransport
Bert W. Rein, Agent
Kirkland, Ellis & Rowe
1776 K Street, N. W.
Washington, D.C. 20006

Kar-Air OY
John L. Richardson, Agent
Verner, Liipfert, Bernhard
& McPherson
1660 L Street, N. W.
Washington, D.C. 20036

KLM Royal Dutch Airlines
F. O. Kielman, Vice Pres.
and General Manager - US
609 Fifth Avenue
New York, New York 10017

Korean Air Lines
Jerrold Scoutt, Jr., Agent
1104 Brawner Building
888 17th Street, N. W.
Washington, D.C. 20006

Laker Airways, Ltd.
Robert M. Beckman, Agent
1001 Connecticut Avenue, N. W.
Washington, D.C. 20036

Linea Aerea Nacional Chile
(Lan-Chile Airlines)
Jorge Hofer, Gen. Mgr. N.A.
150 S.E. Second Avenue
Fourth Floor
Miami, Florida 33131

Lineas Aereas Costarricenses, S. A.
(LACSA)
Robert D. Papkin, Agent
Cox, Langford & Brown
21 Dupont Circle, N.W.
Washington, D.C. 20036

Lineas Aereas de Nicaragua, S.A.
(LANICA)
Luis G. Fernandez, Reg. Mgr. US
41 Columbus Hotel Arcade
Miami, Florida 33132

Lloyd Aereo Boliviano, S.A.
Albert F. Grisard, Agent
412 Metropolitan Bank Building
614 15th Street, N.W.
Washington, D.C. 20005

Lufthansa German Airlines
Frank Ebbighausen
Customer Relations Manager
1640 Hempstead Turnpike
East Meadow, New York 11554

Martin Air Charter
Robert C. Lester, Agent
611 Paramount Building
1735 I Street, N.W.
Washington, D.C. 20006

Nigeria Airways, Ltd.
F. I. Effiom, U.S. Mgr.
30 Rockefeller Plaza
New York, New York 10020

Olympic Airways, S.A.
Dimitri Costas, Traffic Mgr.
888 Seventh Avenue
New York, New York 10019

Pakistan International Airlines Corp.
Rasheed H. Farooq, Gen. Mgr US
545 Fifth Avenue
New York, New York 10017

Philippine Air Lines, Inc.
G. Nathan Calkins, Agent
Canal Square
1054 31st Street, N.W.
Washington, D.C. 20007

Polskie Linie Lotnicze (LOT)
Robert R. Gray, Agent
Hale, Russel, Gray, Seamon & Burkett
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Polynesian Airlines, Ltd.
c/o W. J. P. Cook
New Zealand Embassy
19 Observatory Circle, N.W.
Washington, D.C. 20008

Qantas Airways, Ltd.
John S. Rowe, Reg. Director
- The Americas
350 Post Street
San Francisco, California 94108

Scandinavian Airlines System (SAS)
Neal Oftedal, Mgr. Industry Affairs
138-02 Queens Boulevard
Jamaica, New York 11435

Seagreen Air Transport, Ltd.
Attention: Charles Patterson
P.O. Box 408 494
Miami, Florida 33148

Servicio Aereo de Honduras, S.A.
Sheldon Z. Kaplan, Agent
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Societe Anonyme Belge d'Exploitation
de la Navigation Aerienne (SABENA)
Henri De Sitter, Gen. Mgr. N.A.
125 Community Drive
Great Neck, New York 11021

Societa Aerea Mediterranea
I. B. Sperry, Agent
1001 Connecticut Avenue, N.W.
Suite 1210
Washington, D.C. 20036

Societe Anonyme de Transports
Aeriens (SATA)
Kaler, Worsley, Daniel & Hollman
710 Ring Building
Washington, D.C. 20036

South African Airways
Eric M. Clagett, Agent
888 16th Street, N.W.
Washington, D.C. 20006

Spantax, S.Q.
Boros & Garofalo
460 Bender Building
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

Swissair
Claude H. Christie, Gen. Mgr.
608 Fifth Avenue
New York, New York 10020

Taca International Airlines, S.A.
W.B. Daly, Sr. Vice Pres. Finance
Moisant Field - P.O. Box 428
Kenner, Louisiana 70062

Transavia, N.V.
J.N. Block, Mgr. Director
Schiphol Airport
The Netherlands

Transmeridian Air Cargo Ltd.
Sub-British Air Ferries Ltd.
Paul Reiber, Agent
1625 Eye Street, N.W.
Suite 920
Washington, D.C. 20006

Trans North Turbo Air Ltd. (TNT)
T. A. Kapty, General Mgr.
Box 4338
Whitehorse, Yukon Y1A 3T6

Transportes Aereos Nacionales, S.A.
(Tan Airlines)
Arturo Aceituno, Vice President
and General Manager
P.O. Box 222, IAB
Miami, Florida 33148

Transportes Aereos Portugueses,
S.A.R.L.
James M. Verner, Agent
Verner, Liipfert, Bernhard
& McPherson
1660 L Street, N.W.
Washington, D.C. 20036

Transporturile Aeriene Romane
(Tarom)
John G. Adams, Agent
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

Union de Transports Aeriens
Henri G. Marescot
1350 Avenue of the Americas
New York, New York 10019

Varig, S.A.
Robert Masses, Cargo
Claims Manager
485 Lexington Avenue
New York, New York 10017

Venezolana Internacional de
Aviacion, S.A. (VIASA)
Robert D. Papkin, Agent
Cox, Langford & Brown
21 Dupont Circle, N.W.
Washington, D.C. 20036

Windward Islands Airways
International, N.V.
Robert Lester, Agent
1735 Eye Street, N.W.
Washington, D.C. 20006

Others

Aerospace Industries Assoc. of America
Franz O. Ohlson, Jr.
Vice President - Procurement & Finance
1725 DeSales Street
Washington, D.C. 20036

Air Transport Association of Canada
A. C. Morrison
701 Royal Trust Building
116 Albert Street
Ottawa, Ontario, Canada

American Automobile Association
8111 Gatehouse Road
Falls Church, VA 22042

American Society of Travel Agents
360 Lexington Avenue
New York, NY 10017

Association of Bank Travel Bureaus, Inc.
Beverly Bank Travel Department
First National Bank & Trust Co.
Lincoln, Nebraska 68501

Association of Retail Travel Agents
8 Maple Street
Croton-on-Hudson, NY 10520

Association of Trial Lawyers of America
Joseph G. O'Neill, Director
1620 I Street, N.W.
Washington, D.C. 20006

Aviation Consumer Action Project
Mimi Cutler
P.O. Box 19029
Washington, D.C. 20036

Employers Reinsurance Corp.
Paul V. Miller, Executive Vice President & Actuary
P.O. Box 2088
Kansas City, MO 64142

Federal Aviation Administration
Robert P. Boyle, Chairman,
IGIA Working Group
Warsaw/Guatemala
800 Independence Avenue, S.W.
Room 1000E
Washington, D.C. 20590

Federal Aviation Administration
Bruce I. Selfon, AGC60
Office of the Chief Counsel
Room 921 C
800 Independence Avenue, S.W.
Washington, D.C. 20591

Harris, Kerr, Forster & Co.
Charles W. Horne
5775 - D Glenridge Drive, N.W.
Suite 400
Atlanta, GA 30328

Johnson & Higgins
Prescott S. Bush, Jr.
Vice President & Director
95 Wall Street
New York, NY 10005

Kreindler & Kreindler
Lee Kreindler, Esq.
99 Park Avenue
New York, NY 10016

The National Air Transport Association, Inc.
Thomas S. Miles, President & Chief Executive Officer
1156 15th Street, N.W.
Washington, D.C. 20005

The State of New Jersey
The Honorable James J. Sheeran
Commissioner of Insurance
201 East State Street
Trenton, NJ 08625

New York Department of Insurance
Thomas A. Harnett, Superintendent
of Insurance
2 World Trade Center
New York, New York 10047

Prudential Insurance Company of America
Alan N. Ferguson, F.S.A.
Vice President & Actuary
Prudential Plaza
Newark, New Jersey 07101

United States Aviation Underwriters, Inc.
O. Wayne Link, Vice President
110 William Street
New York, New York 10038

U.S. Department of Commerce
C. William Johnson
Division of Transportation & Insurance
Bureau of International Commerce
Washington, D.C.

U.S. Department of Justice
Robert Salaschen
Office of Legal Counsel
10th and Constitution Avenue
Washington, D.C.

U.S. Department of Justice
David Brown
Antitrust Division
P.O. Box 7513
Washington, D.C. 20044

U.S. Department of State
Franklin K. Willis
Assistant Legal Advisor
Room 5527A
Washington, D.C. 20520

U.S. Department of Transportation
William Driscoll, TGC10
400 Seventh Street, S.W.
Washington, D.C. 20590

U.S. Department of Treasury
Nancy Jacklin
Main Treasury Building, Room 2013
15th and Pennsylvania Avenue, N.W.
Washington, D.C.

Paul R. Ignatius, President
Air Transport Association
of America
1709 New York Avenue, N.W.
Washington, D. C. 20006
Attn: George S. Lapham, Jr.
Assistant General Counsel

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428

Application of

CERTAIN CERTIFICATED U.S. AND
FOREIGN AIR CARRIERS AND THE
PRUDENTIAL INSURANCE COMPANY
OF AMERICA

to establish a Supplemental
Compensation Plan pursuant to
Article 35A of the Warsaw Convention
as amended

Docket 28713
Agreement CAB 25632

PETITION OF THE AVIATION CONSUMER ACTION PROJECT FOR RECONSIDERATION OF ORDER 77-7-85

By Order 77-7-85, served July 20, 1977, the Civil Aeronautics Board approved an agreement among various air carriers and the Prudential Insurance Company to establish a Supplemental Compensation Plan ("SCP") pursuant to Article 35A of the Warsaw Convention, as amended by the Protocols at The Hague, 1955, and Guatemala City, 1971, and the Additional Protocol No. 3 of Montreal, 1975. Pursuant to Rule 37 of the Board's Rules of Practice, the Aviation Consumer Action Project ("ACAP") respectfully requests the Board to reconsider Order 77-7-85, and to withdraw its approval of the Plan pending a public, on-the-record evidentiary proceeding, conducted in accordance with the Federal Aviation Act and the Administrative Procedure Act.

Implementation of this agreement will have a direct and substantial impact upon millions of individual airline passengers. An additional collection -- initially set at $2 per ticket but subject to unilateral upward adjustments by Prudential -- will be extracted from every U.S.-originating passenger in international air transportation. In exchange for this mandatory "surcharge" payment the passengers will purportedly receive an extension in the carriers' potential liability from $117,000 to $317,000 for provable "actual" damages (apparently excluding pain and suffering) for death or personal injury, plus unlimited medical expense coverage. However, the new limits will be absolute, and no additional recoveries will be permitted even where gross misconduct by the carrier is shown. Thus for "covered" passengers the carrier's basic liability exposure -- and its need for insurance coverage -- will in effect be restricted to the first $117,000 of provable damages, after which the SCP will take over.

The result of this arrangement is an enormous and unconscionable boon to the airline industry, which will be relieved of most of its need to obtain accident liability insurance beyond $117,000 per passenger, at the direct expense of passengers who will pay more to travel. Moreover, the practical effect of the package will not be an increase, but rather a reduction in potential recoveries for death or injury of many passengers, because under the existing Warsaw system recoveries of $500,000 or more may be and frequently are obtained by virtue of a carrier's willful misconduct.*/

Despite the vast ramifications of the new scheme, the Board has given the proposal only the most superficial and cursory (albeit slow) examination. The Plan was approved by only three Members, with Judge West not participating for undisclosed reasons and Ms. Bailey not yet on the Board. Not only did the Board summarily refuse to conduct an evidentiary hearing into this complex scheme which will result in enormous new costs for the traveling public, it revealed that its Members had not even met or discussed the agreement among themselves. Order 77-7-85 has all of the hallmarks of a hastily patched-together regulatory fabrication -- apparently rushed to the printer because of the impending Senate Foreign Relations Committee hearings scheduled for July 26 -- rather than the reasoned, deliberate decision-making, based on substantial evidence, to which the public is entitled.

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* See Affidavit of Philip Silverman, Esquire, Appendix A.

1) The sole evidentiary basis for the Board's decision is outdated, erroneous and incomplete. At the core of the Board's approval of the Plan is its conclusion that passengers covered by its provisions will obtain substantial benefits in terms of more adequate recoveries than may be obtained under the present Warsaw system. See Order 77-7-85, at pp. 11-13. The Board erroneously states at p. 11 that, "Under the current regime, recovery by U.S. citizens is limited to $75,000, inclusive of legal fees and costs," apparently unaware that Warsaw in fact is today allowing far greater recoveries on a regular basis.*/ The carriers themselves submitted no evidence in support of the Plan as to what their present levels of settlement are, although they obviously must have that information readily available. To fill this glaring information gap, the Board cites only its own staff studies which were undertaken several years ago, on the basis of incomplete

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* Similarly, the Board appears to have been concerned about the burdens of "expensive and time-consuming litigation" under the present tort system, but does not seem to be aware of the significant developments in trial procedure that have expedited recoveries in recent years. See Speiser, From Roosevelt Field to Tenerife, 82 Case & Comment No. 4, pp. 3-8 (July-August, 1977); see Silverman Affidavit.

and unreliable data voluntarily supplied by the U.S. carriers.*/

At the outset, we would note that the Board's statistical information appears to be seriously out of date. The Board has considered no information for settlements since the first half of 1974. The intervening period covers the disposition of claims for several major aviation accidents including, most recently, the tragic collision of two B-747's at Tenerife, Canary Islands. The Board's failure to update its settlement statistics based on current trends is a serious defect in its decision which, we suggest, should be dealt with now. Moreover, the past three years have seen substantial inflation which should have been reflected in the Board's analysis but apparently was not. Even where claims for property loss alone are involved, the Board has recognized the relevance of inflationary trends to the adequacy of recovery; see e.g., Domestic Baggage Liability Rules Investigation, Order 77-4-73, pp. 3-4 (April 15, 1977). Certainly it should do no less with regard to claims for death and personal injury.**/

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* The industry has an obvious interest in secrecy with respect to large damage awards and settlements, since public knowledge of them would tend to increase public expectations as to future claims. Similarly, arrangements such as those contemplated under the SCP tend to appear more beneficial for the public to the extent that the higher payment levels under the existing scheme are not disclosed. That is why the underlying claims data must be subjected to careful scrutiny and cross-examination.

** See Silverman Affidavit.

Subsequent to the issuance of Order 77-7-85, a devastating critique of the Board's claims recovery data was delivered by Elias J. Saad and John R. Benn of the Cumberland School of Law in testimony before the Senate Foreign Relations Committee. Their analysis, prepared for publication in the Cumberland Law Review, was made a part of the Committee hearings held on July 26, 1977, and is incorporated herein by reference. The Cumberland Study demonstrates that the Board's statistics are incomplete, internally contradictory, and unreliable as a factual basis for approving the SCP:

--On its face, the Cumberland Study notes, the CAB information is incomplete. The 1970 analysis, for example, contained no data with respect to 13 major accidents, involving 162 fatalities and 29 serious injuries, which occurred during the base period of 1960-69. Other information received from the U.S. carriers was insufficiently detailed for inclusion in the CAB tabulations. None of the information was submitted under oath. No data whatever was collected from foreign air carriers operating in U.S. international air transportation, despite the obvious direct relevance of such information. Accordingly, as the Cumberland Study authors conclude, "neither of the CAB Studies was conducted in a manner designed to produce maximum data assimilation for accurate projection of the future needs of the flying public." See Saad/Benn Testimony, pp. 6-7.

--Although the Board denied access to the carriers' underlying information responses, in apparent violation of the Freedom of Information Act, thus making it impossible to double-check the proper assimilation of the data into the CAB studies, the authors of the Cumberland Study nonetheless found major internal inconsistencies in the Board's studies

For example, it was discovered that the 1974 data were not compatible with the 1970 data. A printout purportedly prepared as a composite of the earlier studies omitted hundreds of settlements referred to in the earlier studies, without any attempt to reconcile the discrepancies or explain the missing settlements. With considerable understatement, the Cumberland Study authors concluded that, "Because of this deficiency, the average recovery levels presented in the CAB Printout are questionable at best." Saad/Benn Testimony, p. 9.

--The Cumberland Study also draws into serious question the validity of the sample relied on by the Board in its 1970 and 1974 studies. Based on their own survey of a broad range of interested parties, the Cumberland authors discovered settlements substantially higher than those included in the CAB data, reflecting an apparent conservative bias in the CAB's survey methods, based solely on carrier-supplied data, "which tended to sample the lower range of the settlement universe." Thus, "it is safe to say that if all settlements were reported, the recovery level of the average settlement would be noticeably higher than those determined by the Civil Aeronautics Board." Saad/Benn Testimony, p. 13.

Aside from the apparent inaccuracies of the CAB data, the Cumberland Study calculates that even if the CAB figures are accepted as valid, the SCP will provide deficient recovery levels for the average U.S. accident victim as early as 1985. By the historic 80 percent sufficiency standard of the United States government, standard SPSS computer projections demonstrate that the Plan will be inadequate before it even goes into effect. See Saad/Benn Testimony, pp. 16-18.

Similarly, the increases in future recovery levels projected from the CAB's own conservative data strongly suggest that the assumed ticket surcharge levels may be seriously underestimated. Rather than the initial $2 per ticket surcharge, U.S.-originating passengers are likely to be saddled with additional collections of perhaps $4.50 and possibly as much as $9 per ticket, according to the Cumberland Study. Saad/Benn Testimony, pp. 19-23. The Board, however, apparently was satisfied with Prudential's own self-serving assurances as to the surcharge level and made no independent assessment of its own.

The Board has unquestionably broad powers to obtain reliable information that is needed to perform its regulatory duties in passing upon agreements such as the SCP, not only from U.S. carriers but foreign carriers as well. Its failure to do so in the more than 19 months the SCP has been formally before it for approval, its reliance on outdated and highly questionable data obtained solely from the interested carriers, and its refusal to permit any cross-examination or other testing of the data are, we believe, unfair to the millions of passengers upon whom the SCP surcharges are now to be imposed, and wholly incompatible with any claim to sophistication or rationality in economic analysis. These are precisely the kind of disputed issues of material fact -- is there a substantial consumer benefit or not -- which we believe must be resolved through some kind of hearing.

2) Substantial anticompetitive aspects of the agreement have not been considered by the Board. The Board's Order 77-7-85 concedes (at p. 12) that the Plan has anticompetitive aspects but, in apparent haste to approve the agreement, it fails to make any detailed inquiry into the true nature or

extent of those effects. Unless an accurate assessment of the anticompetitive effects is made, the Board cannot have a rational basis to conclude that the purported public benefits will outweigh the detriments of the agreement. Thus, the fact that Prudential is by far the single most important source of credit for U.S. carriers -- holding almost 10 percent of total trunk indebtedness -- cannot be totally ignored as the Board has done, especially in considering an arrangement that offers the prospect of substantial profits without perceptible risk to the contractor.*/ Moreover, the Board focuses only on the potential anticompetitive effect in the personal trip insurance market, apparently oblivious to the equally important fact that the agreement will effectively eliminate competition for underwriting carrier accident liability in excess of $117,000 (other than for hull loss and non-covered passengers). Nor are these concerns answered by the Board's reference to the purported unwillingness of other insurance carriers to participate in the Plan.**/ But even if all other insurance carriers were willing to cease competing for a share of the underwriting business, that would not make the arrangement acceptable or beneficial to the traveling public which is presumptively entitled to the benefits of competition.

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* As the Board observes at page 9 of Order 77-7-85, for all practical purposes "the Contractor is confined to acting as an agent for the Plan."

** See Order 77-7-85, pp. 10,12. The explanation in footnote 24 of how Prudential was selected merely begs the question, because it does not reveal what concessions were made to induce this company to participate in the Plan, which might have been equally attractive to other potential contractors who expressed a lively interest in possible participation.

3) The Board improperly approved the SCP surcharge without a hearing as required by the Federal Aviation Act. The Board's discussion of the additional surcharge collection essentially ignores the impact of that feature of the agreement on the traveling public and the other statutory criteria set forth in sections 102 and 1002 of the Federal Aviation Act. Moreover, it glosses over the inadequacies of the carriers' justification for the surcharge by relying, among other things, on a ludicrously misleading and inapposite "study" of commercially purchased insurance,*/ and on "restrictions on the agreement mandated by the Convention and the IGIA" (p.13), which we believe are improper considerations for the Board to take into account in this manner.

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* See Order 77-7-85, Appendix D. The information on which this study is based is not, to our knowledge, in the record of this proceeding. Obviously, insurance coverage purchased from Mutual of Omaha is more "expensive" than the non-insurance obtained under the SCP, for which payments are assured only to the extent provable, and since the individual trip policies sold by Mutual may not be rated on a group-risk basis as the SCP is. In addition, the Mutual coverage extends from zero to $200,000, whereas the coverage under the SCP does not include the first $117,000 where many provable claims are likely to fall. The Board fails to include in its "study" the kind of group coverage readily available from Fireman's Fund to American Express cardmembers, providing $150,000 in flight insurance coverage (including coverage on other common carriers en route to airport, choice of beneficiaries and other features) at $3 per ticket, see Attachment A to Answer of ACAP In Support of Motion for Hearing and Open Meeting, which would seem somewhat more comparable to the SCP than the Mutual coverage. It should also be noted that evidence was presented to the Senate Foreign Relations Committee that the current cost of unlimited accident liability insurance for the carriers is in the area of 50¢ per passenger. American Trial Lawyers Association Testimony Before Senate Foreign Relations Committee, July 26, 1977, p. 14. At any rate, the staff's purported comparison of available accident insurance with the SCP cannot properly be considered without an opportunity for cross-examination as to its bases.

The mere fact that an otherwise unidentified executive branch committee may have "mandated" something does not automatically render it consistent with the public's interest or end the CAB's statutory responsibilities.

It is also significant that the initial level of the SCP surcharge was set at $2 in accordance with the IGIA's "requirements". In fact, the Board's own personnel apparently participated actively in the IGIA, so the Board itself must be held presumptively accountable for the establishment of the $2 prescription or guideline with which the carriers have complied in the SCP arrangements. Thus the situation is closely analogous to that in *Moss v. CAB*, 430 F.2d 891 (D.C. Cir. 1970), in which the Board was found to have prescribed passenger fares without the necessary hearing.

Another reason for requiring a hearing is that the Plan is discriminatory on its face. Coverage will be extended to passengers, such as U.S. domiciliaries traveling abroad,*/ who will not be required to pay a dime of surcharge. Moreover, the surcharge will be assessed on passengers without any relationship to the degree of risk involved, the length or nature of their travel plans, or their potential provable losses in case of an accident. For example, a 78-year-old terminal cancer patient flying between Seattle and Vancouver will pay what amounts to a 7 percent surcharge on his ticket for virtually no benefit, while a 30-year-old professional with a dependent spouse and three children who is killed on an around-the-world trip will be surcharged 0.1 percent of his fare but may recover hundreds of thousands of dollars more. Any such radical and prima facie discriminatory departure from a properly cost-based or risk-related rate structure should at least be subjected to the rigors of an evidentiary hearing. See _Transcontinental Bus System, Inc. v. CAB_, 383 F.2d 466 (5th Cir. 1967), _cert. denied_, 390 U.S. 920 (1968). An evidentiary hearing -- or at least oral argument -- is particularly necessary in cases, such as this one, where the issues are of great substantive importance, or are unusually complex or difficult to resolve on the basis of pleadings alone. _National Air Carrier Association v. CAB_, 436 F.2d 185, 191 (D.C. Cir. 1970); _United States v. CAB_, 511 F.2d 1315, 1326 (D.C. Cir. 1975); _Volumair Agreement_, 15 CAB 1007 (1960).

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* The agreement contains no definition of who is covered under "domicile or permanent residence" test of section 3.3(i)(B), which will obviously lead to extensive litigation itself, especially insofar as the passenger's subjective intent may be dispositive. *Cf.*, *Interstate and Intrastate Fares In California and Texas Markets*, Order 76-7-23, pp. 5-6 (July 8, 1976).

4) _The Board failed to appreciate the Plan's direct financial benefit to the airlines._ Order 77-7-85 makes much of the point that the carriers will not themselves profit from the surcharges collected under the SCP. This is incorrect. Under section 1.2 of the Agreement, surcharge collections may be retained by the carrier and invested for its own account until the relevant "due date", which is 30 days after the end of the calendar month in which the collection is "identified" as a plan surcharge. Thus, for a period of never less than 30 days -- and possibly much more, depending on precisely when particular tickets are sold and when the earmarking of SCP surcharge funds occurs -- the carriers have the benefit of the "float" on these funds. Thus the carriers will obtain the use of millions of dollars from these funds

for their own short-term financing, totally interest free.*/ The generalized statement in section 1.2 of the Agreement that the carriers shall have no "beneficial interest" in the funds, to which the Board apparently attaches some significance (see p. 12, n. 32), does not override the manifest benefit that will accrue to the carriers by virtue of the float. In any event, the Board's apparent conclusion that the surcharge is somehow justified by the carriers not standing "to profit from the transactions"**/ is premised on a basic misconception and should be reconsidered.

* * *

For all of the reasons set forth above and those previously brought forth in opposition to approval of the Agreement, ACAP urges the Board to reconsider Order 77-7-85.

Respectfully submitted,

Lawrence M. Noble

Lawrence M. Noble
P. O. Box 19029
Washington, D.C. 20036

Reuben B. Robertson III

Reuben B. Robertson, III
2000 P Street, N.W., Suite 700
Washington, D.C. 20036

Attorneys for Aviation Consumer Action Project

Dated: August 9, 1977

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* Indeed, the carriers' interest is hostile to the passengers in this regard, since the greater the surcharges collected, the more float will be available to supplement their short-term financing, so that the industry plainly cannot be relied upon to monitor the contractor's administration of the Plan to protect against waste or inefficiency.

** Order 77-7-85, at 13. The footnoted reference to note 30 in support of this conclusion is incomprehensible.

BEFORE THE
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C. 20428

Application of

CERTAIN CERTIFICATED U. S. AND
FOREIGN AIR CARRIERS AND THE
PRUDENTIAL INSURANCE COMPANY
OF AMERICA

to establish a Supplemental
Compensation Plan pursuant to
Article 35A of the Warsaw Convention
as amended

Docket 28713

AFFIDAVIT OF PHILIP SILVERMAN

DISTRICT OF COLUMBIA)
) ss:
CITY OF WASHINGTON)

PHILIP SILVERMAN, being duly sworn, hereby deposes and says:

I am an attorney with the firm of Speiser, Krause & Madole, in Washington, D. C. I have been involved in the field of aviation accident litigation for almost fifteen years, including ten years with the Department of Justice defending cases brought against the United States. I am familiar with Order 77-7-85 issued for Docket No. 28713 and make this Affidavit in support of the Petition for Reconsideration filed by Aviation Consumer Action Project.

The Board, in issuing Order 77-7-85 supporting the Supplementary Compensation Plan (hereafter SCP or Plan), relied strongly on data concerning settlements in aircraft accidents which occurred during the calendar years 1960-1969, and another report covering settlements of aircraft accidents during the years of 1970-1974. The Petition for Reconsideration points out the fallacy of the reliance of such figures not only as to recoverable amounts, but also as to the projected amount the international air traveller will have to pay as a ticket surcharge under the SCP.

Your Affiant is a member of a law firm which was involved in the litigation arising out of the Turkish Airlines

DC-10 crash at Paris on March 3, 1974, in which 336 passengers were killed. Our firm represented the families of 165 passengers who perished in the crash. Although the exact settlement figures relating to any one case cannot be mentioned, since the Court has sealed the records of the settlement in each case, from my own knowledge of our cases in the litigation I can state the following:

1. This was a Warsaw Convention oriented litigation brought in the U. S. District Court in Los Angeles, California, against Turkish Airlines, the air carrier, two manufacturers, McDonnell-Douglas Corp. and General Dynamics Corp. and the United States.

2. Cases generally fell into dependency and non-dependency categories. By the middle of 1976, a majority of our cases had been settled. Indeed, at this writing, only two cases remain in the entire litigation.

3. Most of the non-dependency cases were settled at figures which approach the present limitations prescribed by the present Warsaw/Montreal arrangement. Thus the proposed SCP does not affect such claims at all, and nothing is to be gained.

4. But most of the dependency cases, involving middle-class decedents,[1] leaving a widow and children were settled for amounts substantially in excess of $317,000.00 and many of those cases settled for sums in excess of $500,000.00.

5. An example of the potential award to the family of a decedent is the Kween case which involved the death of a husband and wife leaving two minor children, 2 1/2 and 1 1/2 years old. Mr. Kween, 30 years old, was in business with his father running a tobacco shop in England, and was shown to have an earning potential of $16,000.00 per year or more. The jury award was $879,450.00. The award for the loss of the mother Phyllis Kween, 29 years old, was $635,500.00. The verdict was not reduced by the Court, and the case is an appeal, but is earning interest in the interim.

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[1] A middle-class decedent is defined as one earning $15,000.00 per year or more.

Such an award of $1,500,000.00 for the loss of two parents is generally in line with other recent recoveries by settlement or judgment, experienced in litigation in domestic air transportation, and is well above the top limit proposed in the Plan. A sum like $317,000.00 is more often than not a start up figure at which negotiations commence, or first offers are made, in cases where the breadwinner has been killed, leaving a wife and children.

Another reason why the Board's reliance on the old figures is impractical and unrealistic is the factor of inflation. The value of an award is sensitive to inflation, and courts ordinarily allow a claimant to present proof, through an economist, on the effects of inflation and how such inflation erodes the future value of any potential award. Such inflationary changes take place on an almost daily basis and even the airlines are not immune from its effects. Juries consider this factor in determining the ultimate award. However, the Plan which has the effect of limiting the amount of recovery to a family for the loss of its wage earner to a total of $317,000.00 arrived at by use of figures more than three years old is already obsolete, since the Plan does not take into consideration the diminished and continuously diminishing value of the dollar and the future effect of inflation on the ability of a surviving family to support itself at the higher cost of living.

If the Petition for Reconsideration was granted, and a hearing was in fact held, the Board could subpoena the records of the three largest aviation insurance underwriters, Associated Aviation Underwriters, United States Aviation Insurance Group and Lloyds of London, which would give the Board a clearer picture of the present day actual amount of recoveries as they relate to decedents leaving a wife and children, and the Board would thus be able to determine with more up-to-date figures that the proposed SCP is wholly inadequate, discriminatory and detrimental to the majority of international air travellers. The assistance of

BEST COPY AVAILABLE

U. S. District Judge Peirson Hall, who had jurisdiction over the DC-10 Paris crash litigation could also be sought to reveal settlement figures in that litigation for the Board's consideratio

At the same time, even under the present Warsaw/Montreal arrangement, a claimant has the option and opportunity to attempt to avoid the monetary limitations on recovery, by showing that the carrier's agents were reckless or wantonly negligent. In many instances such proof exists. Under the proposed SCP this opportunity or option would not be available.

In an era when many states have shed the artificial limitations on amounts which can be recovered in wrongful death actions,[2] it is regressive and detrimental for the Board to impose the limitations of the SCP against the innocent, international traveller without a hearing and without a more up-to-date and current basis on which to base approval of such a far reaching plan.

The Board also indicates in its Order that the SCP, would avoid lengthy litigation and other controversies concerning payment. However, the SCP does not provide any real improvement over the present system available for multiple disaster aviation litigation. In recent years, the development of procedures whereby the Judicial Panel on Multidistrict Litigation takes cognizance of aviation accidents such as the DC-10 Paris crash and liability discovery is consolidated and coordinated, has had a very beneficial effect on shortening the time between the accident and the willingness of the defendants to accept their responsibility and commence settlement negotiations. For example, in the litigation arising from the L-1011 crash at the Everglades on December 29, 1972, in which our firm, through Donald W. Madole participated as a member of plaintiff's discovery committee, the defendant's liability was established and conceded in only 11 months. Thereafter, settlement negotiations proceeded resulting in settlements, and in many instances where there were surviving families, the amounts were in excess of the limitation presently proposed under the SCP. Even in the more recent litigation resulting from the crash of a B-727 at Mt. Weather in Virginia on December 1, 1974, in which your Affiant was appointed and served as lead counsel, a final agreement as to liability was filed with the court in 11 1/2 months, and virtually all of the then pending cases were settled or tried within six months thereafter, resulting in recoveries which were realistic and fair, in accordance with the status of the decedent and the family which survived him, without the artificiality of any imposed limitations, as proposed in the Plan.

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[2] In recent years, Colorado, Massachusetts, New Hampshire, and Virginia, among others have removed limitations, [illegible]

Philip Silverman
PHILIP SILVERMAN

Sworn to before me this
1th day of August, 1977.

M. Kay [illegible]
Notary Public

My Commission Expires June 30, 1982

LAW OFFICES
JOHN J. KENNELLY AND ASSOCIATES
SUITE 1448-111 W. WASHINGTON STREET
CHICAGO, ILLINOIS 60602
TELEPHONE (312) 346-3646

CABLE ADDRESS
KENAIR

October 15, 1981

Honorable Charles H. Percy, Chairman
Senate Foreign Relations Committee
Senate Office Building
Washington, D.C.   20510

Dear Senator Percy:

This letter is written in relation to the Senate Foreign Relations Committee scheduling of consideration of Montreal Protocols Nos. 3 and 4 for Tuesday, October 20.

I would like to emphasize that although many aviation lawyers are opposed to any type of limitation on liability, I have never taken this position.

However, I do not believe that all members of the Senate understand what the Montreal Protocols 3 and 4 provide. One example: A 45-year-old Senator, with a wife and five children, boards a TWA plane at Dulles Airport, Washington, D.C., to fly to London. The plane crashes on take-off. The undisputed evidence shows that TWA was guilty, not merely of negligence, but of wilfully wrongful conduct -- such as overloading the aircraft, or knowingly permitting it to take off in an unairworthy condition, etc. Assume further that Air Traffic Control is ruled guilty of 5% negligence in failing to exercise reasonable care to guide the disabled aircraft back to Dulles Airport. Thus, TWA is 95% at fault, and the United States of America is 5% at fault.

The judgment is $2,000,000.00 for the family of the Senator.

According to the Protocol, TWA would pay somewhere between $117,000.00 and $300,000.00.

The United States taxpayers would pay somewhere between $1,700,000.00 and $1,833,000.00.

If there is to be some sort of no-fault legislation or treaties, they should include all segments of the aerospace industry (manufacturers, etc.) -- and any such legislation should provide for reasonably adequate compensation.

A real life example involves the deaths of Larry Buchman and David W. Jayne, III. As you probably know, Larry Buchman was a prominent investigative reporter for WGN TV and later ABC. David Jayne was an executive for NBC. They were assisting Barbara Walters regarding her interview with Yassar Arafat in the Middle East; and they were killed while passengers on a "Arab Wings" chartered aircraft flying video tapes from Amman, Jordan to Beirut, Lebanon. Each left a widow and minor children. If the proposed Montreal Protocol were in effect we could not have attained reasonable redress for these families.

I realize that opposition of lawyers is taken "with a grain of salt." However, we have never opposed, and in fact, have advocated a new treaty and national legislation which will provided result in fairness to all segments of the aviation industry as well as passengers. I am Chairman of the Aviation and Space Law Committee of the Torts and Insurance Section of the American Bar Association, and if you desire, I will have a poll taken of the members of the Aviation section to determine how they feel about the proposed Montreal Protocols.

I would think that the Senate would be concerned that the proposed Protocols insulate airlines, even if they are guilty of wilful misconduct, let alone negligence, but leave the United States subject to unlimited liability under the Federal Tort Claims Act for mere negligence.

The proposed protocols fall far short in achieving justice.

Thanking you for your consideration, I am

Very truly yours,

JOHN J. KENNELLY

SPEISER & KRAUSE, P. C.
COUNSELLORS AT LAW
200 Park Avenue
The Pan Am Building
New York, N.Y. 10166
(212) 661-0011
WU TELEX 14-7153
CABLE SPEISATT, NEWYORK

STUART M. SPEISER
CHARLES F. KRAUSE
DONALD W. MADOLE*
ALFRED W. GANS
FRANK H. GRANITO, JR.
PHILIP SILVERMAN
DAVID C. QUINN
JOSEPH T. COOK*
LAWRENCE B. GOLDHIRSCH
HEDY VOIGT
JUANITA M. MADOLE*
DANIEL F. HAYES
RUDOLPH V. PINO, JR.
KENNETH P. NOLAN
J. MICHAEL SCONYERS*

PAUL D. RHEINGOLD
ANDREW L. GREYSTOKE
EVANS W. NORTH*
NED K. ZARTMAN*
COUNSEL

*NOT ADMITTED IN N. Y.

SPEISER, KRAUSE & MADOLE

1216 SIXTEENTH ST. N. W.
WASHINGTON, D. C. 20036
(202) 223-8501
WU TELEX 89-2474

BROADWAY PLAZA BUILDING
700 S. FLOWER ST., SUITE 2604
LOS ANGELES, CALIFORNIA 90017
(213) 623-8188

19-23 PRAED STREET
LONDON W2 IPT ENGLAND
(01) 402-8982
TELEX 21969

PLEASE REPLY TO
NEW YORK OFFICE

December 10, 1981

COMMITTEE ON
DEC 15 1981
FOREIGN RELATIONS

Chairman and Members of the
Senate Foreign Relations Committee
United States Senate
Washington, DC

Gentlemen:

In my capacity as a current member of the Committee on Aeronautics of the Association of the Bar of the City of New York, and as Chairman of the International Law and Treaties Committee of the Association of Trial Lawyers of America, I wish to place before you the recommendation of the Committee on Aeronautics of the Association of the Bar of the City of New York, submitted to the Senate Foreign Relations Committee in June of 1977, opposing ratification of Protocols 3 and 4 amending the Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention) and the Committee Chairman's report concerning the recommendation (copies enclosed).

It is understood that the arbitrary limitation set forth in the Protocols combined with the Supplemental Compensation Plan, would permit recovery of provable damages up to approximately $317,000 in death and injury cases involving international flight. Although the proponents of the Protocols allege that they will bring about "swift, sure and sufficient" recoveries, the arbitrary limitation effectively excludes sufficient recovery (which should be full recovery) in probably fifty percent of the international accident cases involving U. S. citizens. The total number of injury and death cases arising from international flights of U.S. citizens varies from year to year, from zero to 300 cases. Those cases in which provable damages exceed $317,000, can vary from zero to 150 cases.

There is no justification for excluding these cases from full recovery against the airlines. In addition, it has been stated by a leading aviation insurance representative that the cost of insurance for unlimited coverage in U. S. domestic flights is less than a dollar per passenger per round trip. John V. Brennan, President of United States Aviation Underwriters, is quoted in "The Future of Aviation Tort Law," Transcript of Proceedings, ATLA, February 8, 1978 at page 123-A: "For instance, during 1977 the U.S. airlines paid about $.40 per passenger per round trip for liability insurance limits of up to $400,000,000 per occurrence. Ninety percent of these flights were domestic so therefore involved an unlimited liability exposure. Contrast that $.40 charge with the $2.00 per passenger round trip charge that advocates of the Supplemental Compensation Plan to the Guatemala Protocol wish to charge for $200,000 excess of $100,000 per passenger."

Furthermore, in the October 27, 1981 press release of the 1981 annual general meeting of the International Union of Aviation Insurers, at page 4, it is stated: "Indeed, even if per passenger limitation of liability were eliminated in their entirety (as in the case for domestic carriage within the United States), it was generally agreed that an abundance of insurance capacity would be available and any increase in premium would be likely to affect the cost of air travel only marginally if at all."

The expressed reasons of the proponents for support of the Protocols of a) "swift, sure and sufficient recovery" and b) support for the Protocols because they were largely brought about by U. S. effort and initiative, are not sufficient to deny arbitrarily selected claimants the right to the full measure of American justice.

We ask that you reconsider your vote on Protocols 3 and 4 and ask that you vote against ratification when the issue comes up for vote before the Senate.

Respectfully,

Charles F. Krause

Charles F. Krause

June 1977

COMMITTEE ON AERONAUTICS

The work of the Committee on Aeronautics during the year 1976-1977 was directed in the main to its reconsideration of a matter that is now before the Senate Foreign Relations Committee. Just before the end of his term of office, President Ford sent "two related protocols for the unification of certain rules relating to international carriage by air" to the Senate of the United States for its advice and consent[1/]. The protocols,[2/] in sum, pertain to the limitations of liability under the Treaty commonly known as the Warsaw Convention, as modified by the Hague Protocol and/or the Montreal Agreement.[3/] President Ford's request for ratification came as a surprise because it was believed, "as a matter of practical wisdom", the matter would not be submitted for ratification until the Civil Aeronautics Board (CAB) ruled on the petition by the Air Transport Association of America (ATA) for approval of a Supplemental Compensation Plan.[4/]

1/ See Footnote Page.

In January of 1976, at the behest of this Committee, The Association of the Bar of The City of New York submitted its Brief in opposition to the ATA petition recommending that the CAB "disapprove the application, the President decline to submit the treaty protocol to the United States Senate and, if submitted, the Senate decline to give its advice and consent."[5/]

In pertinent part, the Brief filed on behalf of the Association stated as follows with respect to the Guatemala Protocol:

> "This Treaty proposal would amend the Warsaw Treaty, and in those countries where the Hague Protocol has been approved, it would be amended as well. Moreover, the Montreal Agreement would be eliminated by adoption of the Guatemala proposal. The new treaty would increase the damages recoverable from an airline to $120,000; however, recovery above that limit is prohibited, even if the airline was guilty of wilful misconduct." At page 4.

And, with respect to the so called "Supplemental Compensation Plan", the Brief stated, at page 5, as follows:

> "...The United States pressed for... incorporation of a provision in the Guatemala Treaty to permit a country to adopt a plan for compensation supplemental to the Guatemala limit. The ATA's application to the CAB presents such a supplemental plan.
>
> "...Under this plan, every passenger purchasing a ticket in the United States with an international itinerary will be required to pay an assessment of $2.00.

> This additional fee will be collected by the air carrier and transmitted to the Prudential Insurance Company. The resulting fund will probably accumulate at a rate substantially more than ten million dollars a year, will provide Prudential with a guaranteed profit and payment of overhead, and will enable recovery of actual provable damages in excess of the Guatemala limit up to an additional maximum of $200,000 per passenger."

Opposition to the Guatemala Protocol and the Supplemental Compensation Plan was made for the following reasons, as set forth at pages 6 and 7 of the Association's Brief before the CAB:

1. There is no justification in our system of tort law for limiting damages recovered by an injured passenger or by his survivors;
2. According to CAB statistics, the damage limitations proposed under the Guatemala Protocol and under the Supplemental Compensation Plan would deprive many of full recovery;
3. Foreign international airlines, and to a lesser extent domestic airlines, would be the beneficiaries at the expense of American passengers;
4. Airlines no longer require such protection because liability insurance (without arbitrary limitation) is available at a cost substantially below $2.00 per passenger;
5. Since the damage limitations are restricted to airlines under the Protocol, suits against other defendants are thereby encouraged.

Respectfully submitted,

Frank H. Granito, Jr., Chairman

FOOTNOTES

1/ Message from the President of the United States transmitting two related protocols done at Montreal on September 25, 1975, entitled: A. Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as amended by The Protocols at The Hague, on September 28, 1955, and at Guatemala City, March 8, 1971 (hereinafter Montreal Protocol No. 3); and B. Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as amended by The Protocol done at The Hague on September 8, 1955 (hereinafter, Montreal Protocol No. 4).

2/ Frequently referred to in the singular as the "Guatemala Protocol".

3/ Under the Warsaw Convention (signed originally in Warsaw, Poland in 1929 and approved by the United States in 1934), death and injury damages were limited, in the absence of the air carrier's wilful misconduct, to $8,300. In 1955, liability limitations were increased to $16,000 by the Hague Protocol. The United States in dissatisfaction with the amount of the increase, never adherred to the Hague Protocol and, in 1965, served its Notice of Denunciation of the Warsaw Convention. To prevent the Denunciation from taking effect, most of the air carriers of the World entered an interline agreement in 1966 at the eleventh hour and the State Department withdrew its denunciation. Under the interline agreement, called the Montreal Agreement, damages were increased to a limit of $75,000 and the carriers waived all liability defenses save those based on the negligence or wrongdoing of the injured passenger.

4/ Comments of the Committee on Aeronautics of the Association of the Bar of The City of New York on the Proposed Supplementary Compensation Plan to the Guatemala Protocol, July 28, 1972, Pg. 2.

5/ CAB Docket 28713, Brief in Opposition by The Association of the Bar of The City of New York, filed on January 16, 1976; see Page 1.

STATEMENT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Presented at the Public Hearing before the Foreign Relations Committee of the U.S. Senate into the question of the Ratification of Additional Protocol 3 and 4 to Amend the Convention for the Unification of Certain Rules Relating to International Coverage by Air as amended (Warsaw Convention).

Preliminary Remarks

This Association is on record before the Civil Aeronautics Board (CAB Docket #28713) in its opposition to the proposed Guatemala Protocol and the Supplemental Compensation Plan (SCP), however we join with the proponents of the Protocol and SCP in urging this Committee to defer consideration of the Protocol until the CAB has acted on the SCP.

THE POSITION OF THE ASSOCIATION WITH RESPECT TO PROTOCOL 3 AND 4

The position of this Association with respect to Protocol 3 and 4 may be briefly summarized as follows:

1. Limitation of air carrier liability, whether $100,000 under the Protocol or $300,000 under the SCP, is contrary to the prevailing philosophy embodied in American jurisprudence. When the Warsaw Convention was ratified by the United States Senate in 1934, the wrongful death statutes of 16 states and the District of Columbia imposed a limitation on recovery for wrongful death. Today, only that of West Virginia ($110,000) limits recovery for the death of a "breadwinner".1/ None of the states or territories of the United States limit recovery for personal injury.

1/ 4 states continue limitations in those circumstances in which there is no pecuniary loss [Kansas Gen. Stat. §60-1903(1975)], or where the decedent is not survived by a spouse or dependent child [Indiana Ann. Stat. §2-404 (1964)], or dependent parent [Oregon Rev. Stat. §30.020 (1967)]. Wisconsin limits recovery on behalf of dependent children to $10,000 for each child under 21 [Wis. Stat. §895.04 (1971)].

2. Limitation of air carrier liability for passenger death or injury (as imposed under the Warsaw Convention or as proposed either under the Protocol or SCP) is not necessary. In the 50 years since Lindbergh's epic transatlantic flight, the world has seen an infant airline industry grow from its experimental stage to a position of dominance in which more passengers are carried by air than by ship and rail combined. Continued protection of a vigorous industry in the form of arbitrary treaty limits, the moral equivalent of "special interest legislation", cannot be justified by an economic imperative. Liability insurance for actual damages is available at premiums well within the budgets of all air carriers.

3. The Protocol and the SCP present no demonstrable advantage over the prevailing system of unlimited liability that presently governs domestic air travel. The proponents of the Protocol and SCP argue that recovery under a scheme of absolute but limited liability will be "speedy, certain and sufficient". The implication is that such does not obtain under the common law tort system. A similar promise was made by those who supported ratification of the Warsaw Convention. Experience, however, has taught us differently. The Warsaw Convention failed not only to eliminate or even minimize litigation

but became the most litigated treaty in American history. To a greater degree, litigation will be fostered by the SCP. Since airplane manufacturers and governmental agencies are not protected by the Warsaw Convention, they are frequently, but not always, joined as defendants in litigation arising out of transportation subject to the terms of the Treaty. Their joinder is influenced by the sufficiency of the applicable limits. Under the SCP, as presently drawn, the operator of the fund is obligated to seek recovery against all other wrongdoers for monies paid out of the fund. Thus, even in those circumstances in which the applicable limits are sufficient to satisfy actual damages, the non-airline defendants will be involved in litigation.

4. .Under the American system of unlimited common law liability, "speedy, certain and sufficient" recoveries have been made in death and personal injury cases arising out of domestic airline accidents. No authenticated documentation to the contrary has been or could be submitted to this Committee. Examination of the recoveries made during the last 10 years in claims arising out of airline disasters and of the procedures followed in handling these claims clearly demonstrates the speed, certainty and sufficiency of recovery under the common law tort system of unlimited liability.

5. If air carrier operations in the United States can be conducted economically under our common law system of unlimited liability, the same can be done with respect to international air carrier operations.

6. An air carrier's safety record and its insurability under the common law system are not unrelated. The fact that a foreign air carrier is or may be unable to obtain liability insurance or that it cannot remain competitive with American air carriers under circumstances of unlimited liability indicates that the foreign air carrier does not meet the standard of care imposed by Congress on American air carriers in the Federal Aviation Act of 1958, as amended [49 U.S.C. 1301 et seq.]; to wit: that air carriers shall "perform their services with the highest possible degree of safety in the public interest" [49 U.S.C. 1421(b)]. The prospect of limited liability is not in keeping with this concept; particularly under the SCP which would pass the cost of insurance directly to the passenger at a rate much in excess of the premium rate available on the current insurance market.

Conclusion

For the foregoing reasons, The Association of the Bar of The City of New York recommends that the Senate not give its consent to the ratification of Additional Protocol 3 and 4 to amend the Warsaw Convention.

Respectfully Submitted,

The Association of the Bar
of The City of New York
42 West 44th Street
New York, New York 10036

Adrian W. DeWind, President
Paul B. DeWitt, Executive Secretary
Frank H. Granito, Jr., Chairman,
Committee on Aeronautics

November 13, 1981

Hon. Charles H. Percy
4321 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Percy:

This Tuesday, November 17, the Foreign Relations Committee is scheduled to vote on the Montreal Protocols to the Warsaw Convention. If approved, these Protocols would radically revise existing law by putting an absolute ceiling on an airline's liability if passengers are killed or injured on an international flight.

The Protocols should not be approved at this time because there is a serious conflict in the evidence as to whether the new, unbreakable liability ceiling is enough to compensate the victims of air crashes and their families. Before making a drastic change in the law, I urge the Committee to get all the facts -- and the best way to do this is by asking the Civil Aeronautics Board to hold a formal hearing which would iron out the conflicts in the recovery data and give this Committee a sound factual basis with which to consider Senate approval. It is putting the cart before the horse to approve the Protocols first and determine later if the Supplemental Compensation Plan is adequate.

U.S. and foreign airlines presently carry up to $400 million in liability insurance -- enough to pay $1 million each if 400 passengers on a 747 died in a crash. Under the circumstances, it is hard to understand why, on the present record, passengers should be limited to recoveries of only $325,000 -- and be charged $2 extra for limited liability.

Under the current system, it is possible to hold airlines fully liable when people die or are injured in an international air crash. Do you think that passengers would prefer a system where full recovery is possible for a breakdown in air safety, or do you think that the public would prefer to fly under the system proposed in the Montreal Protocols, where airlines would operate without being fully liable to the public for any breakdown in air safety? The former is a greater deterrent to negligence.

Very truly yours,

Ralph Nader

Directors and Staff
Mimi Cutler
Cornish F. Hitchcock
John Cary Sims
Matthew H. Finucane
Katherine Waldbauer
Clarence Ditlow
Martin Rogol

Advisory Board
Ralph Nader, Chairman
James Eckols
Allen Ferguson
Charles Hill
C.O. Miller
Shelby Southard

acap

AVIATION CONSUMER ACTION PROJECT
PO Box 19029 WASHINGTON, DC 20036
TELEPHONE (202) 223-4498

13 October 1981

Hon. Charles H. Percy
Chairman
Senate Foreign Relations Committee
Washington, D.C. 20510

Dear Mr. Chairman:

On 20 October 1981, the Foreign Relations Committee will take up the Montreal Protocols to the Warsaw Convention. The Aviation Consumer Action Project (ACAP), a non-profit consumer organization supported entirely by public contributions, believes that the Committee should defer action because the factual record does not support this radical revision of the law governing airline liability in international air accidents. If the issue does come to a vote on the 20th, however, ACAP believes that the Committee should vote "no," becuase there is not enough evidence that passengers and their families would be better off than they are under the current system.

The Montreal Protocols put an absolute ceiling on an airline's liability if passengers are killed or injured on an international flight. From a consumer viewpoint, depriving accident victims of the ability to make a full recovery is bad in principle unless Congress has established an adequate substitute. However, there is not enough evidence to say that the Montreal Protocols are such an adequate replacement.

Liability Ceiling. ACAP is particularly concerned by the sharply conflicting evidence the Committee has received on the question of whether the Protocols' ceiling of $320,000 per person will adequately compensate the families of crash victims. That figure may sound hefty until one considers that:

(1) experienced trial counsel have testified that a figure such as $320,000 is more in the range of a start-up point at which settlement offers are made when a breadwinner is killed in such accidents today; and

(2) the figure is not insurance. If the family of a crash victim can prove that their loss is only $100,000, that is all they would recover under

the Protocols. If, on the other hand, they can prove their loss is $400,000, all they would recover is $320,000.

Ticket Surcharge. Of the $320,000 maximum, up to the first $120,000 would be paid by the airline, and the balance would be paid out of a fund set up by Prudential from a $2 surcharge on passenger tickets. What makes this surcharge troubling are the following:

(1) U.S. airlines are now fully insured, and leading foreign airlines admit they carry $400 million in liability coverage per accident — enough to pay roughly $1 million per passenger if a fully-loaded 747 crashed, killing all on board. Available evidence shows that the price of this coverage, which passengers are already paying for, has been cut in half over the past ten years and accounts for less than one percent of the price of a coach ticket.

(2) Since passengers are presently paying for full insurance when they buy a ticket, why should they pay an extra $2, particularly when the airline might be less liable than it is today?

(3) The $2 figure is far from fixed. Depending on the assumptions made about payouts from the Prudential fund, the charge could go as high as $6 or $9 per ticket.

Other Issues. The Protocols have been supported on the ground that they will shorten recovery time, but available evidence suggests that many cases are settled quickly today. During the Committee's last hearings on these Protocols, an airline insurance representative testified that offers are made beginning on the day of the crash.

It has also been suggested that the Protocols will limit attorneys' fees paid by the families of crash victims. While liability need not be proven under the Protocols (and it is established early in many cases today anyway), plaintiffs will still have to hire a lawyer to prove their damages.

Recommendation. Because of the important issues the Protocols raise and the long-lasting impact they will have on passengers, ACAP believe the Committee should defer action until the Civil Aeronautics Board has acted on a pending petition to hold an evidentiary hearing on the adequacy of the Protocols' recovery ceiling and related issues. CAB approval of the Prudential plan is required under the Federal Aviation Act, and for the Senate to act first would put the cart before the horse, since, without the Prudential plan, in effect, passenger recovery would be only $120,000. ACAP believes that an on-the-record hearing before the CAB would provide the Committee with the full record it needs to make a considered decision on the advisability of approving the Montreal Protocols.

Very truly yours,

Cornish F. Hitchcock

Cornish F. Hitchcock
Legal Director

KREINDLER & KREINDLER
99 PARK AVENUE
NEW YORK, N.Y. 10016
MURRAY HILL 7-8181
CABLE "KREINDLAIR NEW YORK"
TELEX 14-8305

HARRY E. KREINDLER
LEE S. KREINDLER
PAUL S. EDELMAN
MILTON G. SINCOFF
STANLEY J. LEVY
GERALD A. ROBBIE
PAUL M. BERNSTEIN
MELVIN I. FRIEDMAN
RONALD LITOWITZ
ALAN J. KONIGSBERG
MAX W. BERGER
MARC S. MOLLER
STEVEN J. PHILLIPS
EDWARD A. GROSSMANN
MICHEL F. BAUMEISTER

STEVEN EARL ANDERSON
IVAN B. RUBIN
FRANCIS G. FLEMING*
LAWRENCE W. BURNETT
DANIEL A. BARTOLDUS
GENE KLEINHENDLER
DEBRA G. KOSAKOFF
STEVEN R. POUNIAN
ROBERT I. KOMITOR

*ADMITTED IN PENNSYLVANIA AND ARIZONA

November 11, 1981

Honorable Nancy L. Kassebaum
United States Senate
Washington, D. C. 20510

Dear Senator Kassebaum:

This morning we were provided with one copy of further correspondence to you from the Department of State with reference to Montreal Protocols Nos. 3 and 4. The letter sets forth "answers" to questions regarding the Protocols raised by the Association of Trial Lawyers of America.

These latest Department of State views constitute a reversal of the position it held from 1971 to 1977 and implicitly contradicts much of what was contained in their letter to you of October 22, 1981.

From 1971, when the Guatemala Protocol which has evolved into Montreal Protocol No. 3 was signed, to 1977, the Department of State declined to even submit the Protocols to the Senate for its "advice and consent" because it had not formulated an acceptable supplemental compensation plan. The transcript of the June, 1977 Committee hearings concerning the Protocols confirms this fact. Now, though recognizing, and virtually admitting, that there is grave uncertainty as to whether a supplemental compensation plan can be formulated which is fair to Americans, the Department of State wants approval of the Protocols with the terms of the supplemental compensation plan to be considered thereafter.

We are mindful of the fact that these Protocols have been on the Committee calendar for several years. This is explained by the fact that the SCP, approved by the C.A.B. in 1977, was being challenged in the courts and is of dubious validity. The decision to not press the matter was a C.A.B. decision. The delay was not caused by opponents of the Protocols. To urge affirmative action now on the Protocols to clear the Committee's calendar with the record in its present state will penalize American travelers for bureaucratic inaction.

We also wish to note . . .

Previously the Department of State and C.A.B. hailed the supplemental compensation plan as assuring "speedy" recovery. Now it admits "one cannot guarantee that the Protocols and supplemental compensation plan will speed settlements in all cases". In sharp contrast, however, the Committee record contains representations that international aviation claims are now settled speedily within the context of the litigation process.

The Department of State now further admits that the "costs and availability of carrier insurance is an appropriate subject to be addressed in a review of the supplemental compensation plan." We have provided the Committee with evidence of views articulated by the International Union of Aviation Insurers on October 27, 1981 at its annual meeting that if per passenger limitations of liability were eliminated in their entirety, as is the case for domestic carriage within the United States, such action "would be likely to affect the cost of air travel only marginally if at all."

For the Department of State, and those other interested parties who advocate perpetuation of the limited liability system, to ask the Committee on Foreign Relations to report the Protocols to the Senate when it is not the Protocols, but an inchoate supplemental compensation plan which, in fact, will be the real focus of attention, is unprecedented. The Committee is being asked to rubber stamp, in advance, a program which hurts Americans with no certainty that if it comes into being, it will be fair and offer adequate benefits. The Administration position is being advanced in the face of persuasive evidence that the whole limited liability scheme is unnecessary.

We urge that the Committee decline to act on Montreal Protocols 3 and 4 until there is a supplemental compensation plan which has been approved by the C.A.B. and endorsed by the Department of State. We believe fairness to American air travelers and consumers makes this the only appropriate course to follow that does not involve outright renunciation of the Warsaw Convention limited liability system.

I hope that this further information will be helpful to you.

Very truly yours,

Marc S. Moller

AMERICAN BAR ASSOCIATION

GOVERNMENTAL
RELATIONS OFFICE

DIRECTOR
Herbert E. Hoffman

ASSOCIATE DIRECTOR
Robert D. Evans

STAFF DIRECTOR
FOR BAR LIAISON
Craig H. Baab

STAFF DIRECTORS FOR
GOVERNMENTAL AFFAIRS
Denise A. Cardman
Lillian B. Gaskin

STAFF DIRECTOR FOR
LEGISLATIVE AFFAIRS
Kevin J. Driscoll

STAFF DIRECTOR FOR
ADMINISTRATION
Albin C. Burkman, Jr.

ASSISTANT STAFF DIRECTORS
FOR INFORMATION SERVICES
Elizabeth Goodrich
Peggy A. Richter

ASSISTANT STAFF DIRECTOR
FOR ADMINISTRATION
Kathryn D. Tillman

1800 M STREET, N.W., WASHINGTON, DC 20036 TELEPHONE (202) 331-2200
WRITER'S DIRECT NUMBER 331-2213

November 9. 1981

Honorable Charles H. Percy
Chairman, Committee on Foreign Relations
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I understand that you have scheduled tomorrow consideration by your Committee of the Montreal Protocol #3 (Executive B, 95th Congress, 1st Session) amending the Convention for the Unification of Certain Rules Relating to International Carriage by Air, commonly known as the Warsaw Convention of 1929. On behalf of the American Bar Association I commend your scheduling of this important treaty and urge you to lead the members of your Committee in favorably recommending the Senate's advice and consent.

The American Bar Association, which has supported ratification of this Protocol since shortly after it was transmitted to the Senate by President Ford in 1977, is pleased to join the Administration, the airline industry and others in expressing its support for this improvement to the regime governing the compensation of victims of international airline accident. Our support is premised on the following points.

First, ratification of the Protocol is critical to maintaining the leadership of the United States in improving international aviation law. The Warsaw Convention is the most widely accepted private law treaty in force, currently adhered to by well over a hundred nations on both sides of the Iron Curtain and by developed as well developing nations. Indeed, it was the United States which took the lead in initiating the Protocol and brought considerable pressure on other nations to accept it. For the world leader in this effort to fail to ratify the Montreal Protocol would perhaps fatally undermine the international cooperation in aviation matters upon which the Warsaw

Convention is premised, and which it is intended to foster. Sadly, the failure to ratify the Protocol will have the serious effect of virtually assuring the United States renouncing the Warsaw Convention. The extent to which such a result would have a severe, adverse effect on U.S. credibility and leadership in other international aviation matters cannot be overstated.

Second, the Montreal Protocol would establish worldwide a system whereby U.S. citizens in international air transit, whether touching the United States or not, would be assured of swift, sure and sufficient recovery. The Protocol contains a settlement inducement clause virtually assuring settlement of most claims within six months as opposed to the current system of litigation often requiring six to eight years. Compensation is assured because a plaintiff need only prove damages, and need not prove fault. Furthermore,the Protocol provides unlimited compensation for medical and hospital costs to be paid as those costs are incurred. This provision would guarantee that an injured person would not have to wait until the end of lengthy litigation before the first penny of damages is paid. Recovery would be sufficient in all but a few cases. The 100,000 Special Drawing Rights (SDR's) limit on liability imposed by the Protocol*, in addition to the $200,000 limit established by the supplemental compensation plan (approved by the Civil Aeronautics Board in 1977, but subject to continuing review as to sufficiency) would result in a total of some $317,000 in potential compensation. For example, nearly 97% of the claims settled against one of the airlines involved in the 1977 Tenerife accident were settled for amounts within the limit to be established by this system. Because the Protocol would remove the need for a plaintiff to show fault on the part of an airline -- thus necessitating lower legal expenses (including contingency fees) -- a much larger proportion of the final settlement would go the injured victim or the family of a deceased passenger.

Third, the Protocol would abolish a system of assured, protracted litigation and establish instead a uniform international system of absolute airline liability with expanded coverage and jurisdiction. Under this system U.S. courts will have greater jurisdiction than they now have to protect the rights of United States citizens involved in airline accidents in foreign lands.

Within recent weeks the opponents of the Protocol have circulated material suggesting -- incorrectly -- that, among other things, the statistics developed by the Civil Aeronautics Board on recoveries are

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* The level of compensation under the Protocol is based on Special Drawing Rights, estimates of the value of which have varied in congressional testimony from $100,000 to $125,000, depending upon the estimated value of Special Drawing Rights at the time.

"unduly low, outdated and unreliable", and that the third-of-a-million dollar recovery level would deny many Americans adequate coverage. Both assertions simply are wrong. The airlines and their insurers fully cooperated with the CAB in the development of as complete a statistical base as is now available and have presented updated figures to your Committee. While in individual cases it is indeed true that perhaps 10-15% of injured or killed victims may not receive the same compensation under the Protocol as under the current system, those individuals certainly cannot be said to be inadequately compensated, and are in the income strata where they can be expected to carry substantial personal insurance. However, the important fact which should be emphasized is that the average middle-income traveler -- who will be the greatest beneficiary of this Protocol -- will be fully compensated. As evidence of the fact that a recovery limitation of some $317,000 is adequate, the Civil Aeronautics Board recently promulgated a new rule (ER-1253, adopted October 13, 1981; published October 27, 1981; effective February 23, 1982) requiring all domestic and foreign aircarriers to carry $300,000 per passenger in liability coverage. Thus, it is clear that the limits to be imposed by the Montreal Protocol and the supplemental compensation plan are fully current and within the range of reason since recoveries for airline accidents in the United States are among the highest in the world.

Ratification of the Montreal Protocol would assure swift, sure and adequate settlement of claims of individuals killed or injured in international aviation accidents. Although, as I noted above, some 97% of the 378 claims filed against an airline in the Tenerife crash were settled for amounts within those to be established by the Montreal Protocol, over two years were required before all of those claims were finally settled. If the Senate had given its advice and consent to the Montreal Protocol when first considered in 1977, those same claimants would have received their compensation -- and would immediately have begun to receive medical and hospital costs -- within six months of their claims.

The Montreal Protocol is in the best interests of all U.S. citizens and should be ratified now. As the State Department recently wrote you, the Protocol will not come into force upon ratification, thus permitting sufficient additional time to continue to review the supplemental compensation plan. Consequently, I would urge you and your Committee to oppose any effort to further delay ratification of the Protocol.

Sincerely,

Herbert E. Hoffman
Director

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cc: All Members,
Committee on Foreign Relations